EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 2030

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Plaintiff in Error,

vs.

R. P. DUNLAP,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Nevada.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U.S. Circuit
Court of Appeals
699

No. 2030

UNITED STATES CIRCUIT COURT OF APPEALS

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names of Counsel.]

Mr. RUFUS C. THAYER, for Appellant.
Messrs. McINTOSH & COOKE, for Appellee.

In the Fifth Judicial District Court of the State of Nevada, in and for the County of Nye.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Complaint.

Comes now the plaintiff, by McIntosh & Cooke, his attorneys, and complains against the above-named defendant, and for cause of action alleges:

I. That at all times and dates herein mentioned plaintiff has been and now is a citizen and resident of the town of Tonopah, county of Nye, State of Nevada.

II. That at all the times and dates herein mentioned defendant has been and now is a duly organized corporation, owning property and doing business in the county of Nye, State of Nevada; and that during all of said times its principal office for the transaction of all of business has been, and now is, situated in the town of Tonopah, said county and state.

III. That during the seven years last past, and, to wit, commencing on or about January, 1903, and thence continuing until on or about February 15, 1910, plaintiff has been engaged in the service of, and has rendered services to, defendant, at defendant's instance and request, for which said service the defendant agreed to pay plaintiff whenever defendant was out of debt. And plaintiff here alleges that on said February 15, 1910, the defendant was out of debt, and that it then had a large amount of surplus cash in its treasury.

IV. That the reasonable value of the services so rendered by [1*] plaintiff to defendant is the sum and amount of Twenty-four Thousand Nine Hundred ($24,900.00) Dollars, no part or portion of which has been paid by, for or on behalf of defendant, save and excepting the sum and amount of Three Thousand Nine Hundred ($3,900.00) Dollars paid plaintiff prior to January, 1905, and the sum of Five Hundred ($500.00) Dollars received by plaintiff since said last-named date, leaving a balance still due and owing to plaintiff from defendant in the sum and amount of Twenty Thousand Five Hundred ($20,500.00) Dollars, no part or portion of which has been paid by, for or on behalf of defendant, although demand has been made therefor. Wherefore, plaintiff prays judgment against defendant.

I. For the sum of Twenty Thousand Five Hundred ($20,500.00) Dollars, and for such other and further relief as may seem meet, just and proper.

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*Page number appearing at foot of page of original certified Record.

II. For plaintiff's costs and disbursements herein incurred.

McINTOSH & COOKE,
Attorneys for Plaintiff.

State of Nevada,
County of Nye,—ss.

R. P. Dunlap, being first duly sworn, deposes and says that he is the plaintiff named in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be on information or belief, and as to those matters that he believes it to be true.

R. P. DUNLAP.

Subscribed and sworn to before me this 26th day of February, 1910.

[Notarial Seal] C. H. McINTOSH,
Notary Public. **[2]**

[Endorsement]: No. 2418. In the Fifth Judicial District Court, State of Nevada, County of Nye. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Complaint. Filed Feb. 26, 1910. Robert G. Pohl, Clerk. By Lowell Daniels, Deputy. McIntosh & Cooke, Attorneys for Plaintiff.

No. 1117. U. S. Circuit Court, Dist. Nevada. Filed March 17, 1910. T. J. Edwards, Clerk.

In the Fifth Judicial District Court of the State of Nevada, in and for the County of Nye.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Order of Removal.

This cause coming on for hearing upon application of the defendant herein, in open court, for an order transferring this cause to the United States Circuit Court for the Ninth Circuit, District of Nevada; and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that said defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law; and it appearing to the Court that this is a proper cause for removal to said Circuit Court: Now, therefore, it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States Circuit Court for the Ninth Circuit, District of Nevada, and the clerk is hereby directed to make up the record of said cause for transmission to said court forthwith.

Done in open court this 7th day of March, 1910.

By the Court:

(Signed) MARK R. AVERILL,

Judge. [3]

[Endorsement]: No. 2418. In the Fifth Judicial District Court of the State of Nevada in and for the County of Nye. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Order Removing Cause. Filed Mar. 7, 1910. Robert G. Pohl, Clerk. By Lowell Daniels, Deputy. Rufus C. Thayer, Attorney for Defendant, 1209 Addison Head Building, San Francisco, California.

No. 1117. U. S. Circuit Court, District of Nevada. Filed March 17, 1910. T. J. Edwards, Clerk.

[Stipulation Re Amended Answer.]

In the United States Circuit Court of the Ninth Circuit in and for the District of Nevada.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

It is hereby stipulated and agreed by the parties hereto represented by their respective attorneys, Messrs. McIntosh & Cooke appearing on behalf of the plaintiff, and Rufus C. Thayer, Esquire, appearing on behalf of the defendant, that the amended answer hereto attached may be filed in this action and may be taken and considered as the answer of the

defendant in the above-entitled cause.

Dated this 23d day of April, A. D. 1910.

McINTOSH & COOKE,
Attorneys for Plaintiff.
RUFUS C. THAYER,
Attorney for Defendant.

In the United States Circuit Court of the Ninth Circuit in and for the District of Nevada.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Amended Answer.

Now comes the defendant above named, by Rufus C. Thayer, [4] its attorney, and answering plaintiff's complaint heretofore filed herein, states and alleges:

1. Admits that plaintiff has been and now is a citizen and resident of the town of Tonopah, County of Nye, State of Nevada, as in plaintiff's complaint alleged.

2. Admits that defendant is a corporation as alleged in paragraph 2 of plaintiff's complaint, and states that defendant is a corporation duly created, organized and existing under and by virtue of the laws of the State of Utah, and is authorized to and is carrying on business within the State of Nevada, and in the county of Nye aforesaid.

3. Defendant denies that during the seven years last past or at any time excepting as hereinafter specifically admitted and alleged, plaintiff has been engaged in the service of or has rendered services to the defendant company at defendant's instance or request or at all, and denies that defendant agreed to pay plaintiff for said or any services whenever defendant was out of debt or at any time. Defendant admits that it was out of debt and had a large amount of surplus cash in its treasury on or about the 15th day of February, 1910, but denies that by virtue of that fact or at all it became, ever was, or now is, indebted to plaintiff in any sum whatever.

4. Defendant denies that the reasonable value of services so or at all rendered by plaintiff to defendant is or was the sum or amount of Twenty-four Thousand Nine Hundred Dollars ($24,900), or any sum, and denies that plaintiff ever rendered any services to defendant except as hereinafter alleged and admitted. Defendant admits that it has paid the plaintiff nothing for services except as hereinafter alleged, and **[5]** denies that anything is now due and owing from defendant to plaintiff.

5. And for a further defense, defendant alleges: That at a duly called and held meeting of the Board of Directors of the defendant company, held on the 15th day of January, 1903, the plaintiff herein was elected secretary and treasurer of the defendant company at a salary of one hundred and fifty (150) dollars per month, and that plaintiff served the defendant in that capacity and at said salary from said last mentioned date to and until October 15, 1903, and

that upon said last mentioned date plaintiff's salary as secretary and treasurer was increased to two hundred (200) dollars per month, and that plaintiff so served the defendant company as secretary and treasurer until he resigned, his resignation taking effect February 21, 1905; that during all of said period from January 15, 1903, to February 21, 1905, drew from the defendant corporation, and the defendant corporation paid to the plaintiff, the monthly salary hereinbefore set forth as and when the same became due; that at a regular meeting of the stockholders of said defendant company held on or about September 8, 1903, plaintiff was elected a directer of said company, and immediately qualified as such director, and thereafter served as a director and trustee of said defendant corporation up to and including February 15, 1910; that at a duly called and regular meeting of the Board of Directors of said defendant corporation held on the 11th day of September, 1906, said plaintiff was elected a vice-president of said defendant corporation; that he accepted said office and duly qualified therefor, and served as the vice-president of said defendant corporation until and including February 15, 1910; that plaintiff has performed no services for or on behalf of the defendant corporation excepting [6] those incidental to the office of secretary and treasurer of said corporation, for which he has been fully paid and compensated, and excepting those incident and properly belonging to the offices of a director or vice-president of said corporation, usually, legally and duly performed by such officers without compensation, and that there is noth-

ing now due or owing from said defendant corporation to said plaintiff.

Wherefore, defendant prays that it be dismissed hence with its costs in this behalf expended.

RUFUS C. THAYER,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

Charles E. Knox, being duly sworn, says that he is the president of the Montana-Tonopah Mining Company, defendant in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

CHARLES E. KNOX.

Subscribed and sworn to before me this 21st day of April, A. D. 1910.

[Notarial Seal] GEORGE PATTISON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 1117. In the United States Circuit Court of the Ninth Circuit in and for the District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, etc., Defendant. Amended Answer. Filed April 29, 1910. T. J. Edwards, Clerk. Rufus C. Thayer, Attorney for Deft., 1209 Head Bldg., San Francisco. **[7]**

In the United States Circuit Court of the Ninth Circuit in and for the District of Nevada.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Second Amended Answer.

Now comes the defendant above named, by Rufus C. Thayer, its attorney, and answering plaintiff's complaint heretofore filed herein, states and alleges:

1. Admits that plaintiff has been and now is a citizen and resident of the town of Tonopah, county of Nye, State of Nevada, as in plaintiff's complaint alleged.

2. Admits that defendant is a corporation as alleged in paragraph 2 of plaintiff's complaint, and states that defendant is a corporation, duly created, organized and existing under and by virtue of the laws of the State of Utah, and is authorized to and is carrying on business within the State of Nevada, and in the County of Nye aforesaid.

3. Defendant denies that during the seven years last past, or at any [illegible] excepting as hereinafter specifically admitted and alleged, plaintiff has been engaged in the service of or has rendered services to the defendant company as defendant's instance or request or at all, and denies that defendant agreed to pay plaintiff for said or any services whenever

defendant was out of debt, or at any time. Defendant admits that it was out of debt and had a large amount of surplus cash in its treasury on or about the 18th day of February, 1910, but denies that by virtue of that fact or at all it became, ever was, or now is, indebted to plaintiff in any sum whatever.

4. Defendant denies that the reasonable value of services so or [8] at all rendered by plaintiff to defendant is or was the sum or amount of Twenty-four Thousand Nine Hundred Dollars ($24,900) or any sum, and denies that plaintiff ever rendered any services to defendant except as hereinafter alleged and admitted. Defendant admits that it has paid the plaintiff nothing for services except as hereinafter alleged, and denies that anything is now due and owing from defendant to plaintiff.

5. And for a further defense, defendant alleges: That at a duly called meeting of the Board of Directors of the defendant company, held on the 15th day of January, 1903, the plaintiff herein was elected secretary and treasurer of the defendant company at a salary of One Hundred and Fifty (150) Dollars per month, and that plaintiff served the defendant in that capacity and at said salary from said last mentioned date to and until October 15, 1903, and that upon said last mentioned date plaintiff's salary as secretary and treasurer was increased to two hundred (200) dollars per month, and that plaintiff so served the defendant company as secretary and treasurer until he resigned, his resignation taking effect February 21, 1905; that during all of said period from January 15, 1903, to February 21, 1905,

plaintiff drew from the defendant corporation, and the defendant corporation paid to the plaintiff, the monthly salary hereinbefore set forth as and when the same became due; that at a regular meeting of the stockholders of said defendant company held on or about September 8, 1903, plaintiff was selected a director of said defendant company, and immediately qualified as such director, and thereafter served as a director and trustee of said defendant corporation up to and including February 15, 1910; that at a duly called and regular meeting of the Board of Directors of said **[9]** defendant corporation, held on the 11th day of September, 1906, said plaintiff was elected a vice-president of said defendant corporation; that he accepted said office and duly qualified therefor, and served as the vice-president of said defendant corporation until and including February 15, 1910; that plaintiff has performed no services for or on behalf of the defendant corporation excepting those incidental to the office of secretary and treasurer of said corporation, for which he has been fully paid and compensated, and excepting those incident and properly belonging to the office of a director or vice-president of said corporation, usually, legally and duly performed by such officers without compensation, and that there is nothing now due or owing from said defendant corporation to said plaintiff.

6. And for a further defense defendant states and alleges that as to any and all services alleged to have been performed by the plaintiff in paragraph 3 of plaintiff's complaint which were performed prior to February 15, 1906, plaintiff may not recover the

value thereof for the reason that such recovery and action for the value of such services is barred by the provisions of the laws of the State of Nevada contained in an Act defining the time of commencing of civil actions approved November 21, 1861, and the Acts amendatory thereto.

Wherefore, defendant prays that it be dismissed hence with its costs in this behalf expended.

RUFUS C. THAYER,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

Rufus C. Thayer, being duly sworn, says: That he is the attorney for the defendant in the above-entitled **[10]** action; that he has read the foregoing second amended answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true; that the reason why this verification is not made by an officer of the defendant corporation herein is that there is no officer of said corporation now within the City and County of San Francisco, State of California, the City and County and State where this affiant resides.

RUFUS C. THAYER.

Subscribed and sworn to before me this 12th day of September, A. D. 1910.

[Notarial Seal] HUGH T. SIME,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. Montana-Tonopah Mining Company, Defendant. Amended Complaint. Filed Septr. 20, 1910. T. J. Edwards, Clerk. Rufus C. Thayer, Attorney for Deft., 1209 Addison Head Building, San Francisco.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 1117.

R. P. DUNLAP,

Plaintiff,

vs.

MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff in the sum of $7,500.00.

C. E. MERRICK,
Foreman.

[Endorsed]: No. 1117. U. S. Circuit Court, Dist. of Nevada. R. P. Dunlap vs. Montana-Tonopah Mining Company, a Corporation, Defendant. Verdict. Filed September 24, 1910. T. J. Edwards, Clerk. **[11]**

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 1117.

R. P. DUNLAP,

Plaintiff,

vs.

MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Judgment.

This cause came on regularly for trial at the March term, 1910, of this court, by a jury of twelve persons duly accepted by the parties and sworn to try the issue. Messrs. Summerfield & Curler appeared for the plaintiff; Mr. Rufus C. Thayer, for the defendant; and after introducing their proofs, oral and documentary, the cause was argued by counsel and finally submitted. Whereupon, and after being charged by the Court as to the law of the case, the jury retired for deliberation, and in due time came into court this day and presented their verdict in favor of the plaintiff for the sum of seven thousand and five hundred dollars:

It is therefore ordered and adjudged that the plaintiff have and recover of and from the defendant the sum of seven thousand and five hundred dollars ($7,500), with interest thereon from this day until paid at the rate of seven per cent per annum,

together with his costs herein expended, taxed at $———.

Dated and entered, September 24, 1910.

Attest: T. J. EDWARDS,
Clerk.

[Endorsed]: No. 1117. U. S. Circuit Court, District of Nevada. R. P. Dunlap vs. Montana-Tonopah Mining Company, a Corporation, Defendant. Judgment. Filed Septr. 24, 1910. T. J. Edwards, Clerk.

United States of America,
District of Nevada,—ss.

I, T. J. Edwards, clerk of the Circuit Court of the United States **[12]** for the District of Nevada, do hereby certify that the above and foregoing is a full, true and correct copy of the original judgment now on file and of record in my office; and that the foregoing constitutes and is the judgment-roll in said cause—no summons having come to this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Carson City, this 24th day of September, A. D. 1910, and in the year of our Independence the 135th.

[Seal] T. J. EDWARDS,
Clerk.

[Endorsed]: No. 1117. U. S. Circuit Court, District of Nevada. R. P. Dunlap vs. Montana-Tonopah Mining Company. Judgment-roll. Filed September 24, 1910. T. J. Edwards, Clerk. **[13]**

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 1117.

R. P. DUNLAP,

Plaintiff,

vs.

MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Proposed Bill of Exceptions.

BE IT REMEMBERED, that on the trial of this cause in this court, the same coming on regularly to be heard on Wednesday, the 21st day of September, A. D. 1910, the Honorable E. S. FARRINGTON, Judge, presiding, and Messrs. Summerfield & Curler and McIntosh & Cooke, appearing for the plaintiff, and Rufus C. Thayer, Esquire, appearing for the defendant, when the following proceedings were had, to wit:

A jury was impaneled and sworn according to law, and thereupon the plaintiff, to sustain the issues on his part, offered the testimony of the following witnesses as his evidence in chief: **[14]**

[Testimony of R. P. Dunlap, the Plaintiff, in His Own Behalf.].

R. P. DUNLAP, the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. SUMMERFIELD.)

Q. What is your name? A. R. P. Dunlap.

(Testimony of R. P. Dunlap.)

Q. Where do you live? A. Tonopah.

Q. You are the plaintiff in this case, I believe?

A. Yes, sir.

Q. How long have you resided in Tonopah?

A. Nearly eight years.

Q. Where did you reside before that time?

A. Missouri.

Q. What was your business or occupation when you went to Tonopah?

A. You mean after I got to Tonopah?

Q. What was it when you went to Tonopah?

A. I went there to act as Secretary and Treasurer of the Montana-Tonopah Mining Company.

Q. I say, what was your business or occupation when you went there? A. Prior to that?

Q. Yes.

A. I was in the livestock business at the Kansas City Stock-yards.

Q. Under what circumstances did you go to Tonopah?

A. I went there after having been elected Secretary and Treasurer of the Montana-Tonopah Mining Company by the Directors, January 15th, 1903.

Q. Were you acquainted with the Directors before that time?

A. Acquainted with Mr. Knox and Mr. Lynch.

Q. Mr. Knox and Mr. Lynch? A. Yes, sir.

Q. When did you reach Tonopah?

A. The 24th of January, 1903.

Q. When did you commence the discharge of your duties as Secretary and Treasurer of the defendant

(Testimony of R. P. Dunlap.)

Company? [15]

A. On the evening of the 24th of January, 1903.

Q. Who, if anyone, installed you in your position there?

A. At that time there were present the President, Mr. Knox, and Vice-President, A. C. Ellis, Jr., of Salt Lake, Mr. Charles E. Morris, Mr. Thomas J. Lynch, and Mr. C. W. Whitley of the directorate; there may have been others present, but I do not recall them just at the present time; and the books of the Company were turned over to me by Mr. Morris, who had been acting as Secretary from the 15th of January up to the 24th.

Q. You say that was in the year 1903?

A. Yes, sir.

Q. What was your salary or compensation as Secretary and Treasurer of the Company?

A. One hundred and fifty dollars a month at that time.

Q. What, if any, assistance did you have?

A. None at that time.

Q. What did you do after being installed as Secretary and Treasurer of the Company in January, 1903?

A. Proceeded to discharge the duties of the Secretary and Treasurer of the Company.

Q. Who was the President of the Company?

A. Mr. Charles E. Knox.

Q. Did you do anything else than to discharge the duties of Secretary and Treasurer during the year 1903 for the defendant company?

(Testimony of R. P. Dunlap.)

Mr. THAYER.—I object to that question as calling for a conclusion of the witness. He may ask the witness what he did, but as to what the duties of a Secretary and Treasurer are is entirely a legal conclusion.

The COURT.—I presume that question was intended merely as preliminary, but it would be better to have him simply state the facts. **[16]**

Q. What did you do?

A. I performed the duties of Secretary and Treasurer as called for by the Articles of Incorporation creating that office, and also attended to all of the outside business matters pertaining to the management of the Company, outside of the detailed development underground, which was attended to by the superintendent, Mr. Badgett.

Mr. THAYER.—I move to strike out the answer as not responsive. It does not show what he did.

The COURT.—I will allow that answer to stand, but the showing must be of something more definite than that. There must be a definite showing of what he did.

Q. Describe as nearly in detail as you can, what you did after being installed as Secretary and Treasurer of the defendant Company in January, 1903?

A. During the year 1903, besides looking after the duties as Secretary and Treasurer, I stopped in the town of Reno on two different occasions to check up the patent survey notes with the Surveyor-General, and after they were in shape brought them to Carson City, which was a little later, however, I am ahead

(Testimony of R. P. Dunlap.)

of my story there,—and when they were approved by the Surveyor-General, I, under instructions, went to Belmont, the county seat of Nye County, and made an abstract of title of every bit of property that the Company owned, wrote every deed in my own handwriting, copied them from the records, brought them to Carson City, presented them to the Land Office, and got my order for publication, proceeded to Tonopah and put the matter through publication, and carried on the correspondence that was necessary and incident thereto; came to Carson City on the 21st day of December, 1903, and made the final payment to the Land Office, and forwarded the papers to our attorney [17] in Washington City, Horace F. Clarke, who had charge of the patent proceedings for that end of the line.

Q. You say that you did that under instructions; from whom did you receive your instructions?

A. Mr. Knox.

Q. Was he or was he not the President and Manager of the defendant Company at that time?

A. He was.

Q. Who discharged the duties of Secretary and Treasurer during the time that you were employed?

A. I did.

Q. Now, do you recall at the present time, Mr. Dunlap, anything else that you did during the year 1903, outside of that which you have already stated?

A. May I get my memorandum book for the purpose of refreshing my memory, (After looking at book.) No, sir.

(Testimony of R. P. Dunlap.)

Q. What did you do during the year 1904, if anything?

Mr. THAYER.—If your Honor please, I understand that the objection to these inquiries with reference to matters occurring prior to the time the statute of limitations begins to run, that the objection will go to all of these inquiries. I just wish to have the record show that the objection is made, with the privilege of making a motion to strike all of that after the case is all in, if it seems advisable.

The COURT.—You may make it any way you like. You may make the objection now and I will rule on it.

Mr. THAYER.—Well, I make the objection now.

The COURT.—The objection will be overruled for the present.

Mr. THAYER.—Exception.

The COURT.—Your objection is that it appears to be barred by the statute?

Mr. THAYER.—Yes.

The COURT.—I do not think at the present time I could pass on [18] that very intelligently, until I know all the testimony on the subject: and it may be that is one of the questions of fact that will have to be determined later.

Mr. THAYER.—The objection is simply made for the record.

(Question read: What did you do during the year 1904, if anything?)

A. March 2d, 1904, we had an accident in the mine, which resulted in the death of John Mitchell. I was called to the mine by Mr. Roberts, and I arrived there

(Testimony of R. P. Dunlap.)

just as the body was hoisted to the surface, and it was put into the wagon that I had taken up there for the purpose; I drove to the undertaking establishment and turned the body over, and then proceeded to the house of the widow, in company with Mr. Lynch, one of the directors, and there proceeded to relieve the immediate needs and distress of the family, by giving them a certain sum of money, $100, that I got from Mr. Lynch for the purpose, which was afterwards repaid; I had charge of the Coroner's inquest the next night. we had no attorney in Tonopah at the time, Dixon, Ellis & Ellis of Salt Lake being our attorneys, I conducted the examination of the witnesses before the Coroner's jury.

The COURT.—What about the witnesses, I did not understand that?

A. I said I conducted the examination of the witnesses before the Coroner's jury, and obtained a verdict of absolute exoneration from responsibility by the jury; I advised the Liability Company in which we were carrying liability insurance, received word from them by wire later to the effect that they denied absolutely any responsibility or liability; conferred with Mr. A. C. Ellis, Jr., the Vice-President, by letter and wire, in regard to the matter; proceeded to negotiate with the family of the deceased; and finally succeeded in making a complete settlement with them, getting [197] a receipt therefor for $1,250, and drew up the papers in settlement myself; as I said, we had no attorney, no local attorney in Tonopah; and after strenuous correspondence with the San

(Testimony of R. P. Dunlap.)

Francisco office of the Liability Company, induced them to reimburse the Montana-Tonopah Mining Company in the amount of $1,250, which I had paid to the widow.

Q. You say the defendant Company at that time had no attorney at Tonopah, as I understand you?

A. Yes, sir.

Q. And did or did not the heirs of the deceased have an attorney at the time?

A. They had; there were two attorneys who had gone up to the house and had asked to represent them.

Q. Did they participate in the negotiations with respect to the settlement of the claim for liability?

A. No, sir, they did not.

Q. That was carried on by you, with whom?

A. With Mrs. Mitchell, the widow.

Q. What was the name of the Liability Company, do you remember?

A. I think it was the London Liability Company. I am not certain but that is the best of my memory; the minutes of the Company that are here in the house will show, but I think that is the name of it.

Q. Was it a case of personal injury or death?

A. Death, instantaneous death.

Q. You say there was a widow?

A. A widow and five children.

Q. What else, if anything, did you do during the year 1904, with reference to the defendant Company?

A. In the early summer of 1904, I don't know whether it was May or June, but I think it was May, a party came to me, and advised me of the fact that

(Testimony of R. P. Dunlap.)

there was a scheme on foot to throw the Montana-Tonopah [20] Mining Company in the hands of a receiver by a certain stockbroker by the name of Barton Pittman with offices in Tonopah, who had as his associates in the plan, New York and Philadelphia brokers. Shall I give their names, Judge?

The COURT.—Not unless it is asked.

Q. Just proceed.

A. The plan was for Pittman to place five hundred shares of our stock in the name of Dan W. Edwards, with instructions for him to come to my office, and demand of me in such a way that I would refuse it, the privilege to inspect the mine, and also inspect the books of the Company; and having refused a stockholder that privilege, the papers were already drawn, and a team hired by Mr. Pittman, preparatory to a trip to Belmont, then the county seat, where he would make application to have a—

Mr. THAYER.—Your Honor, I submit that a good deal of this narration is hearsay, improper testimony, and unresponsive, and I would like to have this stricken. I do it in the interests of time-saving more than anything else.

The COURT.—The witness had better confine himself exclusively to matters which are within his actual knowledge.

A. I frustrated the plan.

Q. How; what did you do?

A. By, instead of refusing Mr. Pittman privilege to examine the mine, I arranged for him to examine it; this he did not do. I declined to allow him to examine the books for a financial statement until I

(Testimony of R. P. Dunlap.)

could get the consent of the Directors, simply for the purpose of saving time, and getting time. That would not suit his plan, however, he said it would take too long, and it would be the 15th of the next month,—this was about the 20th of that month,—and the scheme fell through on that ground. One of his [21] partners in the matter was in Tonopah at the time, and made a scene there about it, and left the next morning for New York.

Q. Did you have any assistance in any of those matters?

A. I had a conference with Mr. Thomas Edwards, George Wingfield and Mr. George Bartlett; that was all.

Q. When was it, Mr. Dunlap, that there was a change in your salary as Secretary and Treasurer?

A. My impression was that it was the first of January, 1904, but I find from the minutes of the Company that there was an error there; it was October, 1903, instead of January, 1904, which will account for the discrepancy in the figures in the complaint.

Q. How long after the raise in your salary did you continue to act as Secretary and Treasurer of the Company?

A. From October 15th, 1903, to February 15th, 1905; I think it was February, it may have been January, but I believe February.

Q. Now, what, if anything else, do you remember of doing with reference to this defendant Company during the year 1904, other than that to which you

(Testimony of R. P. Dunlap.)

have already testified?

A. I do not recall anything else.

Q. Describe briefly, and in a general way, what you did as Secretary and Treasurer of the Company; what did you have to do in those offices?

A. I kept the books of the Company, which had to do with receipts and expenditures; made the pay-rolls and pay-checks; kept a record of the development in the mine; attended to all correspondence, and looked after, of course, the bank accounts.

Q. How long did you continue after that time as the Secretary and Treasurer of the defendant Company; that is, after your raise in salary?

A. From October 15th, 1903, to February, either 15th or 21st, 1905. **[22]**

Q. Until February, 1905, did you say?

A. I think it is that; I am not just certain; but I believe it is about February 15th, 1905.

Q. What, if anything, occurred at that time with reference to your relation to the defendant Company?

A. At a meeting of the Board of Directors February 15th, 1905, my resignation as Secretary and Treasurer was acted upon, and a resolution was passed by the Board in regard to it, and which is shown in the minutes of the Company.

Q. Did any different status occur with reference to your relations with, or connection with the defendant Company at that time?

A. Only that I was not required to perform the detail duties of Secretary, and bookkeeper and treasurer of the Company.

(Testimony of R. P. Dunlap.)

Q. Have you a copy of that resolution?

A. I have, sir.

Q. Let me see the copy if you have it there. (Witness hands paper to counsel.)

Mr. SUMMERFIELD.—I call upon the defendant Company for the original minutes, if it has them in court, the minutes of February 2d, 1905.

Mr. THAYER.—You want the resolution? (Hands book to counsel.)

Mr. SUMMERFIELD.—Yes. I desire to offer in evidence the copy of the resolution, purporting to be a resolution of the defendant Company, as contained in the minutes of the Company, of a meeting held on the 2d day of February, 1905.

Mr. THAYER.—You just wish to offer the resolution?

Mr. SUMMERFIELD.—Yes. Are there any objections to it?

Mr. THAYER.—Not at all.

Mr. SUMMERFIELD.—I will ask at this time, if your Honor please, to read it. (Reads:) **[23]**

[Plaintiff's Exhibit "A"—Resolution.]

"WHEREAS, R. P. Dunlap has tendered his resignation as Secretary and Treasurer of this Company,

"BE IT RESOLVED, that the acceptance of his resignation is with sincere regret in losing the valuable services of an officer who has for the past two years shown such zealous interest in its affairs, and whose most able and efficient performance of the

peculiarly difficult duties that have devolved upon him at various times, has earned for him the warmest appreciation of the Board and stockholders, particularly in his careful, conscientious and always satisfactory management of the entire business of the Company, in addition to the affairs of his own office, during occasional and enforced absences of General Manager Knox, and for his energetic and expeditious services in attention to matters connected with securing patent for the Company's mines.

"During the past year we have had one serious accident in the mine which might have resulted in the commencement of a damage suit against the Company, notwithstanding the fact that the Coroner's jury exonerated the Company from responsibility, but for the just and equitable adjustment effected entirely through the good offices of Mr. Dunlap, who forced the Liability Company in which we were insured, to make a satisfactory settlement with the family of John Mitchell.

"We feel that Mr. Dunlap is entitled to the gratitude not only of our own stockholders, but to the gratitude of all persons interested in the development of this district, for blocking certain scheming stock-brokers, whose attempted manipulations of Montana-Tonopah stock by gross misrepresentation and in furtherance of a deeply laid plot, which, if successful, would have practically confiscated half the value of the stock to these brokers. **[24]**

"We are especially pleased and gratified that Mr. Dunlap remains on the Board of Directors, where we may continue to enjoy the benefit of his wise counsel,

which has been such a material factor always, and has contributed in such marked manner to the success of the Company."

Mr. SUMMERFIELD.—I would ask that copy be admitted as an exhibit.

Mr. THAYER.—I did not compare it, but I think it is substantially correct.

The COURT.—It may be admitted at this time, and if counsel finds it is an erroneous copy, it will be corrected later.

Mr. THAYER.—This purports to be the minutes of the meeting; let the whole thing go in.

(Minutes of meeting and resolution admitted and marked Plaintiff's Exhibit "A.")

Q. (Mr. SUMMERFIELD.) Now, Mr. Dunlap, upon the acceptance of this resignation, and the adoption of the resolution which I have just read, what, if any, connection did you have with the defendant Company from that time forward?

A. I was Director of the Company, and performed the same duties, as a general Tonopah representative, up till September, 1905; at that time I was elected Vice-President of the Company.

Mr. THAYER.—I move the response, the latter part of it, after the statement that he was Director, be stricken, as not responsive, not definite.

The COURT.—His statement as to his services will be stricken out.

Q. If I understand you correctly, you said from that time you were a Director of the Company, and at a certain date were Vice-President of the Company;

(Testimony of R. P. Dunlap.)

is that correct? A. Correct. **[25]**

Q. State what you did, if anything, after you ceased to be the Secretary-Treasurer of the Company, I want to know what you did.

A. Well, it would be impossible to find any one item, but there was not a week, and rarely ever a day, that I was not called on by the Superintendent of the property for some sort of a decision or action or instruction, and always performed it, more of a diplomatic and managerial nature than otherwise.

Mr. THAYER.—I move that answer be stricken for the same reason, it is not responsive to the question; he was asked as to what he did; he says he did a number of things. If he performed any services under any contract, let him state what those services were, specifically.

The COURT.—I will allow that to be stricken out.

Q. Commencing with that time, state as definitely as you can, and as succinctly as you can, what you did for this Company, Mr. Dunlap.

A. During the year 1905, do you mean?

Q. Yes.

A. I can hardly find words to express it just right.

Q. Well, if you did anything you know what it was, don't you?

A. I acted as a general consulting agent for the operating department of the Company.

Mr. THAYER.—I move the answer be stricken.

Mr. SUMMERFIELD.—I do not think it is subject to strike out, if your Honor please, but I think

it is subject to a further inquiry, and also to cross-examination.

Mr. THAYER.—I insist upon the objection and upon the motion to strike the answer, where it does not disclose certain specific duties which are performed, so that we may determine later on whether or not those duties are within the scope of his office as a director or as Vice-President.

The COURT.—(After argument.) He simply states that he performed **[26]** the duties of a general consulting agent during that year. I will grant the motion to strike the answer out.

Q. (Mr. SUMMERFIELD.) Mr. Dunlap, I wish you would state to this Court and jury, as nearly as your recollection will permit you so to do, the distinctive character of the acts which you performed for the defendant Company, after ceasing to be Secretary and Treasurer of the same, and how frequent they were; and confine yourself, if possible, to the nature of the acts which you did.

The COURT.—Tell us as far as you can, precisely what you did, without using the general terms; tell us definitely what you did.

A. Well, that is a very difficult thing to do.

Q. Well, did you draw any plans or specifications?

A. No, sir.

Q. Well, what did you do, then?

A. I performed the duties that the President would have performed if he had been there.

Q. That is not telling what you did, Mr. Dunlap; I am trying, if possible, to get you to describe the na-

(Testimony of R. P. Dunlap.)

ture of the acts that you did.

A. I can describe the nature of them, but I could not specify the individual performance.

Q. Well, what were they?

A. Consulting with and advising with the Superintendent and the Secretary, Mr. Edgar Knox at that time, as to the manner in which their duties should be performed, not concerning the underground workings, but as to any business matters that were outside of that.

Q. Do you remember what those matters were?

Mr. THAYER.—Just a moment. I was going to make a motion to strike that answer for the same reason as before.

The COURT.—I will allow you to go on with the next question. The motion will be overruled for the present; we will see what it leads to. **[27]**

A. I would not attempt to detail them; they were multifarious.

Q. Do you remember any specific acts, and about what the subject matter was?

A. I won't attempt to detail any of them, because I don't think I could do it with any degree of satisfaction.

Q. State to this Court and jury if you can, Mr. Dunlap, the first act that you performed of which you have a distinct remembrance, after you ceased to be Secretary and Treasurer for this Company.

A. During the year 1905, does this have reference to that; you have started to take them up year by year, and I want to know.

(Testimony of R. P. Dunlap.)

Q. Well, go to 1906, if you cannot think.

A. Well, I am just asking you because I want to be right.

Q. I understood you to say that you could not detail any of them during the year 1905; is that correct?

A. Yes, sir, that is correct.

Q. Well, then, go to the next year, 1906.

A. They were of the same nature during 1906.

Q. Well, do you remember what they were?

A. Just as I have stated in regard to 1905; I was always at the call of the Superintendent and the Secretary, and was consulting with them at all times in regard to the welfare and the general policy of the Company, and nearly every day and every week.

Q. Who was the Secretary?

A. Mr. Edgar C. Knox.

Q. Who was the Superintendent?

A. Part of the time it was Mr. Gillis, and part of the time it was Mr. Kirby.

Q. Now what did either of them, during the year 1905 or 1906, ever consult you about with reference to the operation of those mines of the defendant Company; about what subject matter, or anything about it? **[28]**

A. About the bank balances, pay-rolls, remittances, general financial status, but never with regard to mining development.

Q. How frequently did that occur during those years?

A. At least once a week, and sometimes two or

(Testimony of R. P. Dunlap.)

three times a week.

Q. You say that Mr. Gillis was Superintendent, and who was the other man?

A. Kirby, John E. Kirby.

Q. Who was the Superintendent during 1905 and 1906?

A. Well, there were two; Mr. Gillis part of the time, and Mr. Kirby.

Q. What did they consult you about during those years if at all?

A. Just my answer to the former question.

Q. Do you recall any other subject matters that you were called upon during those two years to assist in, other than those which you have already mentioned?

A. I do not.

Q. Now, 1907; what, if anything, did you do for the Company during the year 1907, Mr. Dunlap?

A. I made a settlement with Alex Ursin, and a fellow by the name of Jock, I don't know what his other name was, who had been injured by electricity in the transformer house; and made a satisfactory settlement with the parents of Samuel Merton, who had been killed on a cage.

Q. In the year 1907? A. Yes, sir.

Q. Well, state a little more in detail if you can, Mr. Dunlap, what was the nature of those instances, and what you did, and what the result of it was, and what was claimed; give it as fully as you can.

A. These two men were badly burned by electricity in placing a transformer.

(Testimony of R. P. Dunlap.)

The COURT.—(Q.) That is Ursin and Jock?

A. Yes, sir; after they were able to be out I consulted with them frequently in regard to the matter, and at an opportune time got [29] them together, with their attorney, Mr. L. A. Gibbons, into my office, and telephoned for Mr. Knox who happened to be in town at that time, and he came down and made a settlement with them then and there; I drew up the papers of settlement myself.

Q. Was there any suit pending or threatened?

A. Papers were already drawn by Mr. Gibbons for the suits, damage suits.

Q. And you personally attended to that?

A. Yes.

Q. You say you effected a settlement?

A. Yes, sir.

Q. And who was present?

A. Mr. Gibbons, Mr. Knox and the two men who were interested.

Q. About what amount of time and what effort did it require in order to negotiate and carry through and effect these settlements?

A. Well, the negotiations extended over quite a period of time; as often as I saw these boys after they were able to get out of the hospital, I talked the matter over with them, and planned for them to come to my office and make a settlement when they felt like they wanted to do it; and on this day I found them in a receptive mood, and got their attorney, and I made the settlement; paid one of them eleven hundred dol-

(Testimony of R. P. Dunlap.)

lars and the other seven hundred and fifty dollars, as I remember it; gave one of them a job, and offered the other one a job as soon as he wanted it, and he declined it. Alex Ursin, the watchman, his arm was left stiff at the elbow, and he could not perform manual labor, but could perform the duties of a watchman, and he occupied that position as a watchman until he decided to go elsewhere, which he did probably five or six months ago.

Q. What were the amounts in controversy, if you know?

A. The suits were filed for fifteen thousand each.

Q. You say they were filed? **[30]**

A. No, sir, they were to be filed; the papers were drawn for them for fifteen thousand each.

Q. What else, if anything, did you do during that year, that you recall?

A. They had another accident in the mine wherein Samuel Merton was killed on a cage, or where—anyhow, he was dead when the cage got to the top, and was badly mangled; and I went to the house of his parents and conferred with them, and finally got them to agree to accept in full, as our voucher will show, the amount necessary to pay the funeral and burial expenses, which had already been paid for once by the Miners' Union.

Q. What year was that? A. 1907.

Q. Do you have any recollection of any tax proceedings during the year 1907?

Mr. THAYER.—I don't think this witness needs

(Testimony of R. P. Dunlap.)
anything suggested to him; I don't like to be captious.

Q. I just asked if this witness has any recollection, is all.

A. My memorandum calls for that, and I had not quite gotten to it.

Q. Do you have any recollection of it? A. Yes.

Q. I wish you would state to the Court and jury what, if anything, you did with reference to that subject matter, what the status and condition was; what was done by you, and what the termination was.

A. In the year 1907, we were just finishing the mill for which we had contracted this enormous debt we have spoken of so much, and it was listed for assessment on the basis of one hundred thousand dollars, and they started to run on the 22d day of September; on the first Monday or second Monday, whichever it is, that the Board of County Commissioners sits as a Board of Equalization, I appeared before them and took the matter up with them on the basis of the fact that this was not a completed mill, and it was not in a position to perform the duties for which it was planned, [31] it could not work the ore for the year it was taxed, and it was only possible for it to work three months, if that much; on that basis I succeeded in having the assessment cut down from one hundred thousand dollars, which would have been for the full year, to twenty-five thousand dollars, one-fourth of the year; on that basis of tax rate, 1.45 on the hundred, I effected a saving of $2,587.50 in taxes.

Q. Do I understand you that was before the Board

(Testimony of R. P. Dunlap.)

of Equalization? A. Yes, sir.

Q. The Assessor had already assessed the property to the amount mentioned by you?

A. Yes, sir, a hundred thousand dollars.

Q. Is there anything else upon that general subject that occurs to you?

Mr. THAYER.—Will you give the date?

Q. What did you give as the date?

A. September, 1907. And at the same time I effected a reduction in the assessed valuation of the surface improvements of $5,875.00, at the same rate, the full value of which can hardly be appreciated by that mere statement, because it established a lower valuation for succeeding years than had been in effect before.

Q. What was the reduction? A. $5,875.00.

Mr. THAYER.—I do not understand the question; does that refer to the saving or the amount of taxes?

Mr. SUMMERFIELD.—No, I asked what was the reduction from the Assessor's valuation as fixed by the Board of Equalization.

Mr. THAYER.—Not the saving to the Company?

Mr. SUMMERFIELD.—Oh, no.

WITNESS.—The saving to the Company was $202.88; $5,875.00 reduction.

Q. In the valuation? A. Yes, sir. **[32]**

Q. Do you recall any other incidents upon that general subject matter, which occurred during the year 1907? A. No, sir.

(Testimony of R. P. Dunlap.)

RECESS.

Q. Do you recall any during the year 1906, the previous year?

A. During the great San Francisco fire there were a great many stock certificates lost, as we all know.

The COURT.—What year is this?

Mr. SUMMERFIELD.—1906, I have referred back.

A. We had a great deal of voluminous correspondence in regard to the reissue of stock to holders.

Mr. THAYER.—Just a moment. The witness says "we."

WITNESS.—The Company.

Mr. THAYER.—The proper thing in this character of testimony is to say whether or not he did it; it is for his services he is seeking compensation, and not for others.

The COURT.—That is correct.

Q. State what you did.

A. At the instance of the Secretary, I conferred with and collaborated with Mr. Brown, our attorney, and made up a general indemnifying bond to protect the Company against possible loss in case of the reappearance of any of these stock certificates which were claimed to have been burned; and put the general valuation of indemnity at ten dollars per share; and under that form of bond; and all stock issued under those circumstances was issued under that form of bond, and the bonds are now with the Company.

Q. Who was it that you consulted with?

(Testimony of R. P. Dunlap.)

A. With Mr. Hugh Brown, the attorney, we made up this form of indemnifying bond.

Q. What did the Secretary have to do with it, you mentioned the Secretary's name?

A. He issued the stock under the bond. **[33]**

Q. Well, did you have anything to do with the Secretary, or was it with Mr. Brown, the attorney of the Company? A. Both.

Q. With both of them? A. Yes.

Q. Now do you recall any other specific services, and their nature and character, performed by you for the defendant Company during the year 1907, which was the year I was interrogating you about when the Court took a recess?

A. During 1906 and 1907 there were several instances wherein the Company was asked to issue stock, reissue stock which was endorsed by administrators, and such representatives of deceased persons; and on several occasions, whether it was all or not I don't know, but on several occasions, I was always asked what should be done about the matter, and invariably I took the matter up by correspondence with proper authorities, and saw to it that we had certified copies of the court proceedings, showing the proper appointment of these administrators or executors who sought to have the stock transferred, thus protecting the interests of the Company.

Q. You don't know how frequent that was?

A. No, sir, I would not say how frequently.

Q. Do you recall any other specific services rendered by you to the defendant Company during that

(Testimony of R. P. Dunlap.)

year? A. That was 1907. No, sir, I do not.

Q. Now, go to the year 1908.

A. Specifically speaking, for 1908, on the 9th of October, 1908, Thomas H. Swope, was injured at the mill, and it resulted in the loss of his arm.

Q. What did you do about it, if anything?

A. I arranged for a settlement with him in full for an amount of five hundred dollars, and we sent the draft, together with a letter of instructions to the bank at Independence, Missouri, whereby **[34]** he was to receive the balance after the bill for surgical work by Doctor Hammond had been paid and returned to Doctor Hammond by the bank.

Q. What was the extent of the negotiations; state as briefly as you can the extent of those negotiations, and who they were with.

A. Several conversations with Mr. Swope himself, and the passage of two or three letters with his attorney, J. G. Paxton, of Independence, Missouri.

Q. Do you know what amount the injured person, Mr. Swope, claimed?

A. No, sir, I don't know that he made any specific claim.

Q. Do you know whether or not there was any contemplated litigation with reference thereto?

Mr. THAYER.—I object to that as calling for a conclusion.

A. I had a statement from his attorney.

Q. Wait a minute.

The COURT.—You can state what you know of your own knowledge.

(Testimony of R. P. Dunlap.)

A. One letter that I received from his attorney, Mr. Paxton, stated that he hoped it would not be necessary for him to engage the services of a Nevada lawyer for the purpose of proceeding against the Company in order to see that Thomas Swope's interests were protected.

Mr. THAYER.—I should like to have some foundation for that statement, if the witness has the letter.

A. No, sir.

Q. Have you the letter?

A. No, sir, not with me.

Q. Do you know what became of it?

A. Yes, sir, it is in my files at Tonopah.

Mr. THAYER.—Then I move that the answer be stricken.

The COURT.—The answer may be stricken out.

Q. What time in 1908 was that Swope matter taken up and consummated? [35]

A. The injury occurred on the 9th day of October.

Q. In the year 1908?

A. 1908, yes, sir; I do not recall just when it was finally consummated.

Q. Who, if anyone, connected with the defendant Company co-operated with you in the matter of the adjustment of the Swope matter?

A. At a Directors' meeting I wrote a resolution setting forth the situation, which was presented, I think by Mr. McQuillan; the minutes will show.

Q. Do you remember about the date of it?

A. No, probably December.

(Testimony of R. P. Dunlap.)

Q. Look at these minutes, and see if you can find it; you are more familiar with them than I am. (Hands book to witness.)

Mr. THAYER.—The witness has answered that he wrote the resolution, and then he was asked the date; but the question as to who co-operated with him has not been answered.

A. I was trying to get to that.

Q. (Mr. SUMMERFIELD.) Do you remember whether or not anyone connected with the defendant Company co-operated with you in the adjustment of that matter? A. Yes, sir.

Q. Well, who were they?

A. Well, Mr. Knox, more particularly than anybody else.

Q. Which Mr. Knox, the Secretary or President of the Company?

A. No, the President. Mr. Alexander was Secretary at the time.

Q. Now, possibly I misunderstood you, but I understood you to speak about a Directors' meeting; did you so state or did I misunderstand you?

A. Yes, sir, I was talking to that point when I was interrupted, and I stopped until I should get instructions to go on.

The COURT.—Well, that matter as to what occurred at the Directors' meeting was not responsive to the question that was asked. **[36]**

A. It was showing co-operation, Judge, was the reason I answered that way.

The COURT.—That was not responsive, and the

(Testimony of R. P. Dunlap.)

answer will be stricken out; if that is proper it will have to be elicited by some further question.

Q. (Mr. SUMMERFIELD.) Were there any other persons connected with the Company other than Mr. Knox, whom you recollect at the present time co-operated with you in that matter?

A. No, sir.

Q. Are you unable at the present time to state any more definitely than you have already stated about the time of the year 1908 in which this Swope matter was adjusted? A. Yes, sir.

Q. Well, about when?

A. I would say it was during the month of January, 1908; the minutes of the meeting of January 6th, 1908, show the resolution; I know it occurred a short time after that.

The COURT.—(Q.) When did you say that accident occurred?

A. October 9th, 1908, and the settlement was made in 1909.

The COURT.—The resolution, then, was in 1909?

A. It was the January following. What is the date, please?

Mr. SUMMERFIELD.—It is January, 1908; it must have occurred then in 1907?

A. It must have according to that resolution. Just a little slip of the memory there as to the year.

Q. Now, what, if anything, further do you remember as occurring during the year 1908, in which you rendered services for the Company, if you did render such services; do you remember any further specific

(Testimony of R. P. Dunlap.)

instances, Mr. Dunlap?

A. I appeared before the Board of Equalization in that year.

The COURT.—This is 1908 now?

A. 1908.

Q. What did you do?

A. In regard to the taxes?

Q. What did you do before the Board? **[37]**

A. I am just trying to specify that now, Mr. Summerfield. It was the year of 1908 that the State Board of Equalization decided that all railroad properties, whether main line or sidetrack, should be listed as such; the Montana-Tonopah owns forty-three hundred feet of track, which was supposed to have been included in the general assessment list, but it was assessed separately, and a tax bill sent in for it; and I appeared before the Board of Equalization, and had the amount at which it was assessed deducted from the general list, thus saving the taxes on that amount.

Q. Do you remember what it was; have you got the figures?

A. I am checking them up here. The amount saved was $78.09 per year.

Q. What, if any other instances, do you recall during the year 1908, other than you have already mentioned, in which you did anything for the defendant Company?

A. I do not recall any specific instance.

Q. Do you recall any course of conduct in the management of the Company's affairs or in any work or

(Testimony of R. P. Dunlap.)

employment done by you during the year 1908, other than what you have already specified?

Mr. THAYER.—The question is objected to as not being specific and relating to the issues in the case, and immaterial. While the question on its face can be answered yes or no, it is evidently the intention of counsel to secure another answer than what the question calls for.

The COURT.—You may answer the question yes or no, but nothing further.

A. No further than the—

Q. I just asked you, do you remember?

The COURT.—If you do remember, say yes; and if you do not remember, say no. **[38]**

A. I do not quite understand it, there have been so many interruptions.

(Question read by reporter.)

A. No, sir.

Q. Proceed to the next year now, Mr. Dunlap. What, if anything, do you recall that you did for the defendant Company during the year 1909?

A. Nothing but the general course of conduct that has been objected to.

Q. I did not understand that.

A. Nothing but the general course of conduct that has been objected to; I would not specify; I don't recall.

Q. Did you do anything for the Company during the year? A. Yes, sir.

Q. What?

A. I answered the same question a while ago and

(Testimony of R. P. Dunlap.)

it was stricken out, in regard to acting as general consulting agent for everybody connected with it; so if you want it answered again that way, I will have to answer it that way.

Q. What did you do?

The COURT.—Mr. Dunlap, you are asking compensation for certain services rendered; you and the defendant, if the services were rendered, cannot agree as to the value; you are leaving that value to the jury to decide; now, the jury must know what those services were in order for them to have a clear idea as to how the services should be compensated, which you say you have rendered.

Q. (Mr. SUMMERFIELD.) Now, state, if you are able so to do, Mr. Dunlap, what it was that you did. You say you were called upon and performed services, what was it that you did?

A. I gave my opinion.

Q. What about?

A. Business matters that were called to my attention; they were unable to settle themselves. **[39]**

Q. What were those transactions?

A. I cannot recall; it would be impossible to recall.

Q. Well, was it with reference to office work, or mining work, or development work?

Mr. THAYER.—I object to the form of the inquiry; I do not think this witness needs to have matters suggested to him at all.

Mr. SUMMERFIELD.—I am not suggesting, if the Court please.

(Testimony of R. P. Dunlap.)

The COURT.—I will allow that question; it is not suggesting the answer, I do not think it is objectionable in that sense.

A. It was more of an administrative nature than anything else, and executive; not with relation to mine development, not with relation to casting up a certain column of figures in the office, but general administrative and executive matters.

Mr. THAYER.—I make the same motion that the answer be stricken for the reason it is too vague and indefinite.

The COURT.—We will see when he is through with it, so far it appears to be too vague and indefinite.

Q. Do you remember who it was in connection with?

A. More particularly with Mr. Alexander than anybody else, he being the secretary of the company matters of that kind came up to him.

Q. What would it be about?

A. It would be about stock issues; about general business transactions, and about the payment of notes which we owed at that time; signing of notes which were authorized by resolution, for money borrowed.

Q. Do you recall anything else?

A. That is the general nature of it.

Q. How frequently would that occur? **[40]**

A. I could not give dates, but very frequently.

Q. Can't you be more definite than that, very frequently? A. Two or three times a week.

Q. Where were you living at that time?

(Testimony of R. P. Dunlap.)

A. At Tonopah.

Q. And where with reference to the offices of the Company, its headquarters or place of business?

A. Living up at the Montana Club, which is situated at the mine.

Q. At the mine? A. Yes, sir.

Q. Do you recall anything further now, than what you have already specified as occurring during the year 1909, in which you did anything for this defendant Company? A. No, sir, I don't.

Q. When did your relations with the Company cease, Mr. Dunlap?

A. The 15th of February, 1910.

Q. And how did they cease; what were the circumstances under which you ceased to have a connection with the defendant Company?

A. At the meeting of the Board of Directors, I made the statement to the effect that I thought the time had come and the conditions were then right, when I should be compensated for the services that I had rendered the Company. There were present at the meeting Mr. Knox, Mr. Alexander, Mr. Lynch and myself.

Mr. THAYER.—Just a moment, if you please. May I ask the witness a question?

Mr. SUMMERFIELD.—I have no objection.

Q. (Mr. THAYER.) Do you intend to relate what occurred at the meeting? A. Yes, sir.

Mr. THAYER.—I submit the best evidence of what took place at the meeting are the minutes of the meeting.

(Testimony of R. P. Dunlap.)

Mr. SUMMERFIELD.—I have not asked that.

Mr. THAYER.—I know you did not; he said that is what he intends to do. **[41]**

WITNESS.—Yes, I intend to do that, if you will let me.

Q. (Mr. SUMMERFIELD.) Who was present, you say?

A. Mr. Knox, Mr Lynch, Mr. Alexander and myself. I can answer specifically your question now without going into those details. My connection with the company was severed by the acceptance of my resignation.

Q. That was in February, 1910? A. Yes, sir.

Q. What if anything was done at that time, Mr. Dunlap, with reference to your claim for compensation?

Mr. THAYER.—I object to the question unless it is shown that the minutes are to be impeached, or are not here, or not available to show what was done.

Mr. SUMMERFIELD.—I deny that the minutes of a corporation in a case of this kind are the exclusive evidence of what took place. As a matter of fact, the minutes of a Board, are not the exclusive evidence upon any subject. It is evidence, if it is evidence at all, that is entirely within the control of one side, and whatever that one side might have placed in the minutes could not be binding upon the other party, unless he consented to it.

The COURT.—Well, I cannot decide at the present time that the minutes are not a correct statement of precisely what occurred at the meeting; and until

(Testimony of R. P. Dunlap.)

that is shown the minutes are the best evidence of the occurrences at that time.

Mr. SUMMERFIELD.—I will ask for the benefit of an exception, if the Court please, to the ruling of your Honor, assigning as the ground for exception, that the minutes are neither the best nor the exclusive evidence of what took place between two parties, where their interests are hostile to each other.

Q. Did you receive any writing from the Directors or from the Secretary of the Company, following your demand for a recompense **[42]** for services which you had rendered? A. I did.

Q. Have you that writing in your possession?

A. No, sir.

Q. Where is it? A. The Secretary has it.

Q. What was it? I don't ask you the contents, but for an identification of it, so I can call upon the Secretary for it.

A. It was a voucher and a check corresponding to the voucher.

Mr. SUMMERFIELD.—I would now call upon counsel, if they have it in their possession, for the voucher and the check, being, I believe, for the sum of one thousand dollars.

WITNESS.—I have a copy of it.

Mr. THAYER.—We haven't it.

Mr. SUMMERFIELD.—Let me see your copy. (Witness hands copy to counsel.)

Q. Who made the copy, Mr. Dunlap, if you know?

A. I did.

Mr. SUMMERFIELD.—Have you the original of

(Testimony of R. P. Dunlap.)

that document?

Mr. THAYER.—We have not; we have it in the offices of the Company at Tonopah, but we haven't it here.

Q. Do you know, Mr. Dunlap, whether or not this is a correct copy of the one that you saw, that the Company retained?

A. It is a copy of the one they presented to me.

Q. Of the one they presented to you?

A. Yes, sir, accompanied by a check for one thousand dollars.

Mr. THAYER.—I move that that latter statement be stricken, because an objection will go to all of this, if counsel intends to insist upon the idea that he can introduce it.

The COURT.—The question was as to whether this was a correct copy of the document that was presented to him at the time, and he said it was a correct copy, and there was also a check for a thousand dollars presented. The answer as to the check was not responsive to the question, and for that reason it may go out. **[43]**

Q. From whom did you receive the document of which you say this is a copy?

Mr. THAYER.—Just a moment, please. This document is a voucher which was sent to the plaintiff, intending to be, or looking towards a compromise or gratuity for any services which he claims to have rendered to this Company, the same services on which this action is based, and I think it is improper testimony.

(Testimony of R. P. Dunlap.)

The COURT.—Until I know that is a compromise I cannot rule on it. For aught I know it is a document that would be material. I cannot rule on it until I see it, and when the question comes properly before me I will pass on it.

Q. (Mr. SUMMERFIELD.) Who did you say you received it from?

A. Mr. Alexander, Secretary of the Montana-Tonopah Mining Company.

Q. And when with reference to this meeting, at the time you made a claim?

A. I think it was the following day, I won't be certain; it might have been two days later, but I think it was the following day.

Q. And where did you last see the document?

A. In my office, where Mr. Alexander left it in my possession.

Q. What did you do with it, if anything?

A. Mailed to Mr. Alexander.

Mr. SUMMERFIELD.—If the Court please, I now offer in evidence what the witness has identified as being a copy of a document returned to the defendant Company, and which, if I understand the matter correctly, is in their possession, but at Tonopah, Nevada.

Mr. THAYER.—It is objected to for the reasons stated heretofore, that it was an offer of compromise of a claim made by the plaintiff, which is the subject of this action.

Mr. SUMMERFIELD.—There is no evidence to that effect whatever.

Mr. THAYER.—The document itself contains the evidence. [44]

The COURT.—(After argument.) It seems to me, taking the transaction altogether, that it is an offer to make a compromise, and for that reason I think I must sustain the objection.

Mr. SUMMERFIELD.—I ask, if the Court please, that the document be identified by the Clerk as having been offered and refused by the Court, in order to make the record clear; and upon that ruling I desire the benefit of an exception, upon the ground, and assigning as our ground of exception, that the document and its terms are evidentiary of the issues in this case, to wit, whether he was ever employed by the Company at all.

The COURT.—On that phase of the matter, I am willing to listen further, but it seems to me there is a part of it that is objectionable, and that part is sufficient to exclude it at the present time. I will say, gentlemen, that I am very willing at any time before the case is submitted to the jury, to correct any ruling, if you find it is incorrect. You will be allowed an exception and the document will be marked for identification.

(The document is marked by the Clerk for identification, and reads as follows:)

[Exhibit—Copy of Voucher in Favor of R. P. Dunlap.]

"Copy of Voucher.

Montana-Tonopah Mining Co. Voucher No. ——
Tonopah, Nevada. Check No. ——

To R. P. DUNLAP, Dr.
Tonopah, Nevada.

1910.

Feb. 15. Compensation for services rendered during the past five years as authorized by resolution of the Board of Directors of Feb. 15th, 1910, as follows: The exercise of his good offices in behalf of the Company in the case of accident to employees of this Company, more particularly in the case of John Mitchell, S. Merton and others; his efforts securing a reduction of taxes on the properties of this more particularly for the taxes of the year 1907, when the tax against the mill was $3,-450.00, which through *Mr. Dun—Company lap's* efforts was reduced to $862.50 **[45]** thereby effecting a savings of $2587.50, and at the same time a reduction of $5875.00 in the assessed valuation of the surface improvements, resulting in a saving of $202.88, and the separate listing of the railroad spur, effecting a saving of $78.09.

Total authorized by Board....$1000.00

February 16, 1910.

Received from The Montana-Tonopah Mining Co. the sum of One Thousand and no/100.....Dollars in full payment of above account.

Please sign this voucher, receipt attached bills and return promptly without alteration. Do not detach papers."

Mr. SUMMERFIELD.—I would like, if your Honor please, to reserve the right at a future time to reoffer it for the specific purpose mentioned in my exception, to wit, upon the ground of employment.

The COURT.—That may be done.

WITNESS.—The minutes cover the same thing; it is practically a copy of the minutes.

Mr. SUMMERFIELD.—Let me see the minutes of that meeting. I now offer in evidence that portion of the minutes of the defendant Company under date February 15th, 1910, commencing on the 13th line from the bottom of page 105, and extending from the 7th line from the bottom of page 106.

Mr. THAYER.—The portion of the minutes offered is objected to upon the ground that they contain a resolution which is a proposal of settlement from the defendant Company to the plaintiff with reference to the matters which are the subject of this action.

The COURT.—I will allow that to take the same course as the other. I will make a *pro forma* ruling excluding it for the present, **[46]** but I shall consider it later.

Mr. SUMMERFIELD.—I desire to take the same

(Testimony of R. P. Dunlap.)

exception, and make a reservation of a right to re-offer it for a specific purpose at a later time to be indicated.

Q. What, if anything, have you received from the defendant Company for and on account of the services mentioned by you in your testimony, and for which you have brought suit?

A. I received the aggregate sums as shown by $150 a month for a certain period, and $200 for a certain period; just how much it is I have forgotten, but it can be easily calculated, when I was secretary.

Q. Have you received any other sum than that mentioned in your complaint?

A. No, sir, I have not.

Q. Who, if anyone, did you have any conversation with during the time embraced in this complaint, with reference to compensation?

A. Mr. Knox.

Q. Which Mr. Knox?

A. Charles E. Knox, the President of the Company.

Q. Was Mr. Knox at the time or times of such conversations the President of the Company?

A. Yes, sir.

Q. Can you specify or designate with any degree of certainty the time and place of such conversations?

A. Well, I will state that there were numerous conversations prior to the one that I can designate; I cannot give the dates of those.

Q. Well, give the date of the one that you say that

(Testimony of R. P. Dunlap.)

you do remember particularly, and where was it?

A. It was the last one upon that point; it was in the early part of 1908.

Q. And where? A. In Tonopah. **[47]**

Q. At what place in Tonopah?

A. In my office and on the road up to the mine, continued the conversation along that line.

Q. Who, if anyone was present besides yourself and Mr. Knox? A. No one.

Q. State what that conversation was.

Mr. THAYER.—We object to that. I assume it is for the purpose of proving a contract alleged in the complaint. Unless it is shown that the President of a corporation had express authority from the corporation itself to bind the company, he has no such authority. Without a resolution of the Board of Directors he has no authority greater than any other director of the corporation for the purpose of making contracts for the company. And the question is apparently intended to elicit an answer relating to the contract of employment for the reason that it goes to the compensation which the witness says was under discussion at this conversation; and a mere conversation with a President of a corporation, or between two directors, is absolutely immaterial and irrelevant to the issues of this case.

The COURT.—Do you expect to prove by this testimony an employment and contract, and fixing of the value of the services?

Mr. SUMMERFIELD.—No, I do not expect to prove that; but upon the contrary, expect to prove,

(Testimony of R. P. Dunlap.)

or attempt to prove at least, by that, that there was a certain time when the matter would be taken up, and he would be paid; it was with reference to the time.

The COURT.—It was simply an agreement as to the time when he would be paid?

Mr. SUMMERFIELD.—Yes. **[48]**

The COURT.—Well, it is 4 o'clock now, and I will pass on that in the morning.

Court adjourned until Thursday, September 22, at 10 A. M.

Thursday, September 22, 1910.

Court convened 10 A. M.

(Last question read by reporter: State what that conversation was.)

The COURT.—It don't seem to me there has been sufficient authority shown on the part of Mr. Knox to make the agreement which is sought to be elicited by this conversation.

Mr. SUMMERFIELD.—I withdraw the question, and will interrogate the witness further.

Q. Mr. Dunlap, if I recollect correctly, you have already stated in your testimony that during all of the time mentioned in your complaint, that Mr. Charles E. Knox was the President of the defendant Company, is that correct? A. Yes, sir.

Q. Now, during the time embraced within your complaint, I wish you would state to this Court and jury, as concisely and briefly as you can, what Mr. Knox did with reference to the operations of the defendant Company.

(Testimony of R. P. Dunlap.)

A. He had general supervision of the business affairs of the Company; he, as President, signed the stock certificates and presided at Directors' meetings when he was there; visited the mine in company with the superintendent; consulted about the development of the property; in general terms, this is the scope of his performances.

Q. Do you know during that time, Mr. Dunlap, of how many members the Board of Directors consisted? A. Nine.

Q. And do you know of that number, how many were residents of Nevada, or that ordinarily met at the meetings there, personally? **[49]**

A. Ordinarily, there were three members present, that number being necessary for a quorum, seldom more than that.

Q. Well, you haven't answered my question yet. How many of the membership of the Board of Directors were residents outside of this State?

A. Outside of the State?

Q. Yes.

A. I did not understand the question that way. Why, the majority were residents outside of the State.

The COURT.—(Q.) What do you mean by the majority, how many?

Q. In number?

A. Well, the personnel of the Board of Directors changes from time to time, and it would be impossible to state positively and exactly at all dates how many were nonresidents of the State of Nevada.

(Testimony of R. P. Dunlap.)

Q. Well, do you recall who the directors were?

A. Why, I think I could name them; I might be a little off at times in regard to that, because they change so frequently.

Q. Well, state it as nearly as you can remember.

A. Well, when I first became connected with the company, Charles E. Knox, Thomas J. Lynch, Charles W. Whitley, Charles E. Morris, W. J. Douglas, S. D. Forman, A. G. Cushman.

Q. Yourself?

A. Not at first; no, sir. Mr. George F. Badgett was a director a little later on than that, the early part of 1903; R. B. Wampler.

Q. Who was the first one that was named?

A. Charles E. Knox.

Q. Mr. Knox was the President of the Company also? A. Yes, sir.

Q. And was he there frequently?

A. Yes, sir; he was there frequently, off and on.

Q. About what proportion of the time, as far as you know?

A. Well, I would say on an average of five or six days in a month. **[50]**

Q. Five or six days in a month? A. Yes, sir.

Q. Who is the next one mentioned?

A. Mr. Lynch was a resident of Tonopah, and was there frequently.

Q. Most of the time? A. Yes, sir.

Q. Now, the next one that you recall?

A. A. C. Ellis, Jr., of Salt Lake was rarely ever there, just an occasional visitor.

(Testimony of R. P. Dunlap.)

Q. Residing where? A. Salt Lake.

Q. The next one?

A. C. W. Whitley, residing in Salt Lake; I never saw him there but once.

Q. In the whole time? A. Yes, sir.

Q. The next one?

A. Charles E. Morris, he was a resident of Montana, and made occasional visits to Tonopah.

Q. How frequently?

A. Oh, I would say twice a year.

Q. And for how long a time?

A. He would be there a week sometimes, and sometimes he would stay a month.

Q. Now, the next one?

A. S. D. Forman was a resident of Tonopah, and attended the meetings. A. G. Cushman was a resident of Tonopah and attended the meetings. George F. Badgett, superintendent of the mine at the time, was a director. Those three, Mr. Forman, Mr. Cushman and Mr. Badgett, practically constituted the business quorum for several months; they met and transacted whatever business was to be done.

Q. Now, what changes in the directorate do you recall in the way of substitution of names, or otherwise, or by resignation, or anything of the kind?

A. At the regular annual meeting of 1903 there was quite a number of changes. **[51]**

Q. Give the names of the directors now as nearly as you can recall them, and their residences, and how frequently they were there, briefly.

(Testimony of R. P. Dunlap.)

A. Messrs. Forman and Cushman were no longer members of the directorate after that annual meeting in September, 1903.

Q. Who succeeded them, if you know?

A. I was elected to one of the vacancies, but I don't remember who the other was.

Q. Do you remember of any other changes occurring during the year 1903? A. No, sir; I do not.

Q. Go to the next year, 1904. Do you remember of any changes in the personnel of the directorate of the Montana-Tonopah in that year?

A. I do not until the annual meeting in September, then there were some changes.

Q. What were those changes?

A. Mr. George A. Bartlett and Malcolm MacDonald were added to the directorate in place of Thomas J. Lynch and W. J. Douglas, if I recall; and Mr. Dudley Baldwin of Cleveland, Ohio, was elected a director, I think, at that meeting.

Q. How frequently did Mr. Bartlett attend?

A. Very seldom.

Q. Where was he, if you know, most of the time?

A. Most of the time in Tonopah, or at that time Belmont was the county seat, and he was there a good deal of the time attending to his law practice.

Q. What was this other gentleman's name, Mr. MacDonald, where did he reside?

A. He resided in and around Tonopah; he was operating there.

Q. How frequently did he attend, if you know?

(Testimony of R. P. Dunlap.)

A. Well, I would say not more than a fourth of the time.

Q. What was that other gentleman's name, Mr. Baldwin? **[52]**

Mr. THAYER.—If your Honor please, I shall have to object to this line of interrogation. The minutes of these meetings are the best evidence of who the directors of the Company were, and who attended the meetings. I have no objection if Mr. Dunlap actually knows, but it would be rather a remarkable thing if he could recall accurately who attended these meetings, and it is too much to expect.

The COURT.—If counsel has any particular point in it, I should think the testimony would be best drawn from the books, but I presume this is preliminary to something else. I do not see where it meets any of the issues in the case, unless it is preliminary.

Mr. SUMMERFIELD.—I would simply state that the object, and your Honor and counsel know that I do not wish to uselessly take up time, but it is simply to show whether or not there was such an attendance or majority of the Board of Directors there that the Board of Directors could take action in matters, and then to lead from that whether there was some person there who assumed and did act as the executive manager of the Company in the matter of the employment of help, and the operation of the mine, and meeting all of such emergencies as might arise in its operation; which could not be brought before full meetings of the Board of Directors; that is the ob-

(Testimony of R. P. Dunlap.)

ject of it.

The COURT.—I should think it would be just as well, Mr. Summerfield, if you propose to prove that, to look the matter up in the minutes, and it can be put in a great deal more quickly than it can in this way.

Mr. SUMMERFIELD.—I will adopt your Honor's suggestion, as far as I can. Your Honor will understand that the minute-book has been in the hands of the Company; and you and counsel understand [53] the way I came into this case.

Mr. THAYER.—If your Honor will pardon me, I think perhaps I can set counsel right on one point. The laws of the State of Utah provide as we all know, that the articles of incorporation shall set forth what number, if any, shall constitute a quorum for the transaction of business, and as shall be set forth in the charter, and the charter of the Company and the articles of incorporation provide—this is not a matter of evidence, but just a matter of information—that a quorum shall consist of three members of the Board for the transaction of the business of the Company.

Q. (Mr. SUMMERFIELD.)—Now, during the time embraced in your complaint, Mr. Dunlap, who, if you know, directed the employment of the operatives of that Company, and directed its general management at Tonopah, where the mines of the defendant Company are situated?

A. Mr. George F. Badgett, in the early day, as foreman, employed the people in and about the mine,

(Testimony of R. P. Dunlap.)

the operatives; and Mr. Know suggested and had in charge the employment of all other people.

Q. Of every one except the operators?

A. Except the operators.

Q. Underground workers?

A. Not absolutely underground workers, but those connected immediately with the development of the property, that was in the hands of the foreman.

Q. Who, if anyone, directed you, Mr. Dunlap, in the matter of adjusting and negotiating about the settlement of these claims, and appearing before the Board of Equalization, and all of those various matters which you have testified to specifically?

A. Well, Mr. Knox, as President; and Mr. A. C. Ellis, as Vice-President, and Mr. Alexander as Secretary, and Mr. Kirby as General Manager, covering the different periods in which these matters came up.

[54]

Q. During the time you were Secretary and Treasurer of the Company, and when employed during that time upon any of these other matters, concerning which you have testified, did anyone else besides yourself perform any of the duties of Secretary and Treasurer? A. No, sir.

Q. Now, after you ceased to be Secretary and Treasurer of the Company in 1905, I don't remember the exact date, and until February, 1910, whatever services you performed, and concerning which you have testified, by whom, if anyone, were you directed or requested to perform such services?

A. By Mr. Knox and Mr. Alexander, Mr. Carr.

(Testimony of R. P. Dunlap.)

Q. Who is he?

A. M. B. Carr was at one time the General Manager of the Company.

Q. When? A. When was he General Manager?

Q. Yes.

A. He was General Manager from September, 1905, till September, 1906, or August, 1905 to August, 1906.

Q. Who had control of these matters, if you know?

A. Why, I had control of them.

Q. Did you have the initiative?

A. Why, I had to take it in order to bring the matter up between the Company and the complainant.

Q. Did you, or did you not, receive any directions from anyone at all connected with the Company with reference to attending to these matters?

A. Well, I had conversations wherein it was understood that I should go and look after them and attend to them.

Q. Who with?

A. With the different parties I have just spoken of, Mr. Knox, Mr. Kirby, Mr. Alexander, Mr. Carr, Mr. Collins.

Q. Are you able to state any more fully than you have already done what degree of control Mr. Knox, the President, had of the [55] affairs of that Company in the local management and the operation of the defendant company's mine at Tonopah?

A. Well, it was understood at all times that he was supposed—

(Testimony of R. P. Dunlap.)

Mr. THAYER.—I think the witness should not say what was understood at all times, but should give the evidence from what he knows.

The COURT.—State what he did, what business he transacted, what contracts he entered into.

A. He either accepted or rejected every contract that was made.

Q. What did he do with reference to any of the matters concerning which you have testified as having rendered services for the Company?

A. He accepted them all as being satisfactory.

Q. What, if anything, did he have to do with reference to their negotiations and settlements in the first instance, or during the progress of the same?

A. In part of them he had none; in part, he participated.

Q. Now, to what extent, if you can briefly state. I don't mean the extent of his participations, but with reference to the subject of each one; what ones?

A. Well, in the matter of the Thomas H. Swope settlement.

Q. What about the Mitchell one?

A. Nothing whatever.

Q. What about appearing before the Board of Equalization? A. Never appeared.

Q. I did not ask you whether he appeared, I asked you what he had to do, if anything, with directing what you did. A. Nothing whatever.

Q. What about the patenting of the different claims or real estate, or property of the Mining Company, concerning which you have testified?

(Testimony of R. P. Dunlap.)

A. Well, he authorized me to do the work that was necessary; he had nothing to do with the work itself.

[56]

Q. I did not ask you, Mr. Dunlap, what he did himself. A. I did not quite understand you then.

Q. I want to know what his connections were, if anything, with reference to directing you to do it.

A. Well, sir, he directed me to do it.

Q. Now, do you know whether or not any of these matters came before the Board of Directors?

A. Yes, sir.

Q. What ones?

A. Practically all of them, for their sanction or rejection.

Q. Were you present at the meeting of February 15th, 1910, of the Board of Directors?

A. Yes, sir.

Q. Now, previous to that time, if I understand you correctly, you had a conversation with Mr. Knox, the President of the Company, with reference to your compensation for these services concerning which you have testified? A. Yes, sir.

Q. And you recall one specific time and place, and the others you are not able to recall with reference to time and place, is that correct?

A. Yes, sir, that is correct.

Q. I now renew the question last propounded, to wit: State the time and place and conversation as nearly as you can remember, with Mr. Knox, the President, with reference to your compensation for those services.

(Testimony of R. P. Dunlap.)

Mr. THAYER.—I object, may it please the Court, for the reason that it does not appear from any testimony that Mr. Knox was authorized to employ, or to agree with the plaintiff with reference to compensation; and for the further reason that if Mr. Knox or the corporation itself, had agreed with the plaintiff for compensation, the plaintiff, being a director and officer of the corporation during the time within which the services alleged in the complaint were rendered, that such agreement, after the services [57] were rendered, would be entirely without consideration, and would be void. This conversation now referred to took place in 1908, less than two years prior to the commencement of this action and five years after the beginning of the services for which the plaintiff is suing.

The COURT.—(After argument.) On the question of being without consideration, it seems to me if the Company owed Mr. Dunlap for services, the money was due at once, when the services were rendered; if the agreement is made with Mr. Dunlap's consent, that they need not pay this money until the Company is in fair condition, then it would seem to me that there was a consideration because he has agreed to wait for his money. As to the other objection, that there has been no authority shown on the part of Mr. Knox to execute a contract of this kind, or to make a contract of this kind, it seems to me there has been some testimony on that. He can be authorized by a direct vote of the directors to make contracts of that sort; or, if he is in the habit of doing

(Testimony of R. P. Dunlap.)

it, and it has been his course of operations, and the Company has acquiesced in it, and has accepted the benefits, and he has been making contracts, we have a right to assume that he has the authority to do it. From the testimony that has been introduced it would seem to me that Mr. Knox either accepted or rejected all contracts that were made; therefore, I shall admit the question.

Mr. THAYER.—We save an exception.

The COURT.—You may have an exception.

(Question read by reporter.)

A. I think it was either in January, 1908, or maybe February, 1908, the last conversation that we had on this point. The conversation began in my office at the town of Tonopah, and we continued [58] it as we went up to the mine; it was with particular reference to a correspondence that I had already started with the different directors of the Company looking toward the giving of Mr. Knox for special services—

Mr. THAYER.—We object to going into this as not responsive to the question; the question relates to Mr. Dunlap's compensation, not to any compensation to Mr. Knox, and we desire to have that eliminated as not being pertinent to the issue.

A. I understood the question to be to repeat the conversation as nearly as I could.

The COURT.—You only repeat that which is in response to this question, which relates to your agreement with Mr. Knox.

Q. With reference to the pay for your services.

A. Well, I recall particularly that Mr. Knox said,

(Testimony of R. P. Dunlap.)

"Let this matter come out as it may, when we get out of debt and on Easy Street, I propose to see that your services are properly compensated for."

Q. What did you say to Mr. Knox in reply to that statement by him?

A. I do not recall particularly what I said, unless it was that was all right; I relied strictly on that assurance, as I had had it before on several occasions.

Q. You say that you had had general conversations with Mr. Knox to the same effect, but you cannot state the date and place? A. Yes, sir, frequently.

Q. Now, when, if you know, did the defendant Company get out of debt?

A. It paid the last indebtedness on the 24th day of August, 1909.

Q. When, if you know, did the defendant Company have funds in its treasury, after having discharged its indebtedness?

A. From August 24th, 1909, up to the present time.

[59]

A. That is not an answer to my question, I don't believe. Did they have a surplus fund at that time, in August, 1909?

A. Yes, sir; and from then up to the present time.

Q. Upon what basis, Mr. Dunlap, have you made your charges against this company in the complaint?

A. I based it upon the amount of remuneration that was voted by the Board of Directors to Mr. Knox upon one occasion, which he refused to accept, as being inadequate; $250 a month.

Mr. THAYER.—I move to strike all the portion

(Testimony of R. P. Dunlap.)

of the witness' answer which is not responsive.

Mr. SUMMERFIELD.—I do not object to striking out all except that; his basis of a monthly charge, I did not ask for the other.

The COURT.—The motion will be granted then.

Q. If I understand you then, it was upon the basis of $250 a month during that time? A. Yes, sir.

Q. Are you acquainted and do you have a knowledge of the value of such services in that section of the country during the time that is embraced in your complaint? A. Yes, sir.

Q. What was it, if you know?

A. Well, they varied, according to the size of the Company and the extent of the duties.

Mr. THAYER.—I do not understand what the question means, "such services."

Q. (Mr. SUMMERFIELD.)—Services of the character which you have testified that you rendered during the time embraced within the complaint.

Mr. THAYER.—There is nothing to show that the services were consecutive or continuous; that he, upon different occasions, rendered certain services with reference to patenting claims and settling claims against the Company, and appeared before the Board of Equalization. **[60]**

Mr. SUMMERFIELD.—That is a matter for the jury to consider under all the testimony. There is testimony here that there were almost daily services, outside of the mere discharge of his duties in keeping the books and paying out the money on the pay-rolls, but he could not itemize them and specify each par-

(Testimony of R. P. Dunlap.)

ticular date, and just what the particular thing was. As I understand it, it does not have to be an absolutely continuous service.

The COURT.—(After argument.) I will admit the question.

Mr. THAYER.—Exception, please.

A. As I stated, or started to, it varies according to the size of the Company and the amount of work that is necessary to bring about these results.

Q. Now, Mr. Dunlap, I direct my question to you specifically: What was the value in that country for the kind of services that you performed?

A. I would say from two hundred to eight hundred dollars a month.

Q. Two hundred you would place as the minimum and eight hundred dollars as the maximum, would you? A. Yes, sir.

Q. Now you say you were present at the meeting of the Board of Directors on the 15th day of February, 1910? A. Yes, sir.

Q. Who was present at that meeting?

A. Mr. Knox, Mr. Alexander, Mr. Lynch and myself.

Q. Were you present during all the time they were in session? A. No, sir.

Q. Were you present a portion of the time?

A. Yes, sir.

Q. Were you present during any time when the matter of compensation for your services was under consideration? A. Yes, sir.

Q. I will ask you to state what, if anything, was

(Testimony of R. P. Dunlap.)

said while you were present, by Mr. Lynch as a director? **[61]**

(Question objected to. Objection sustained.)

Q. Were you present when the directors took action at all? A. No, sir.

Q. Where were you?

A. I was in an adjoining room.

Cross-examination.

(By Mr. THAYER.)

Q. You say you were in an adjoining room, Mr. Dunlap, at this meeting? A. Yes, sir.

Q. Whose room were you in?

A. I was out in the general office of the Company.

Q. When did you first talk with Messrs. McIntosh and Cooke about bringing this action?

A. I think it was the day following my resignation, probably the 16th or 17th of February.

Q. You became connected with this Company through Mr. Knox, did you not? A. Yes, sir.

Q. How long had you known Mr. Knox at the time you entered the employ of the Company?

A. Well, probably twelve or fifteen years, I do not recall.

Q. How long had you known Mr. Lynch?

A. I had just met Mr. Lynch, met him in November, 1902, first, and then again in December, 1902, in Kansas City.

Q. You asked Mr. Knox about the prospects for doing business for yourself in Nevada, at one time, did you not, in Kansas City?

A. Oh, yes, we talked it over a great many times.

(Testimony of R. P. Dunlap.)

Q. And you came out with him? A. Yes.

Q. Were you elected as Secretary of the Company before you arrived in Tonopah?

A. Before I came there to stay permanently, but I had been there before.

Q. You had been there before? A. Yes. **[62]**

Q. When you came out with Mr. Knox you were not Secretary of the Company? A. No, sir.

Q. What time was that? A. November, 1902.

Q. Did you go back to Kansas City after that?

A. Yes, sir.

Q. And how long were you in Kansas City?

A. Until the 20th of January, 1903.

Q. Then, you came out with the understanding that you would be Secretary of this Company?

A. No, sir, I had already been elected on the 15th of January, and was advised by wire to that effect.

Q. You knew when you went back to Kansas City, you were assured that you would be?

A. Yes, sir, I thought I might be, that was the desire anyway.

Q. Did you know what salary you were to have at that time? A. No, sir.

Q. Did you know what your predecessor had received? A. No, sir, I did not.

Q. But you knew the salary would be about $150 a month?

A. Well, I can't say that I knew that; I knew it would be—

Q. Well, you had that assurance?

A. I knew it would be enough for me to live on.

(Testimony of R. P. Dunlap.)

Q. Did you have any other business when you came back to Tonopah in January, 1903?

A. No, sir.

Q. Did you ever do any stock brokerage business in Tonopah? A. No, sir.

Q. Not of any kind whatever?

A. Never did any brokerage business at all.

Q. Never bought stock for anybody at all?

A. Bought them, but didn't charge any brokerage, simply acted as a friend from time to time. **[63]**

Q. You never sold stocks for anybody?

A. Turned them over to people to sell on the Board in San Francisco.

Q. And on those transactions you never received any profit whatever? A. No, sir.

Mr. SUMMERFIELD.—I object as being not cross-examination, and immaterial to any issue in this case, as to what he might have done.

The COURT.—It seems to me he can go into the question of the business he was engaged in during the time he claims to have been employed by the Company, or working for the Company.

Mr. SUMERFIELD.—I do not understand that it is directed to that time.

The COURT.—If it is not directed to that time, it is improper and will be excluded.

Mr. THAYER.—Within the time, which is the subject of this action. I understand plaintiff is suing the Company for compensation for every day since he has been in Tonopah, January, 1903, including the time during which he was drawing a salary,

(Testimony of R. P. Dunlap.)

up to February 15th, 1910.

Mr. SUMMERFIELD.—That is true; I did not understand, though, that you were directing your question to that period of time.

Q. You say you never bought or sold any stock for anyone else upon which you made a profit?

A. No, sir.

Mr. SUMMERFIELD.—Object, if the Court please, as not being limited within the time set forth in the complaint.

Mr. THAYER.—I will limit it.

Q. All of these questions, Mr. Dunlap, which I shall propound to you relate to the time embraced within the period set forth in the complaint?

A. Yes, sir.

Q. Did you give every minute of your time to the service of the **[64]** Company?

A. No, not every minute.

Q. The Company was paying you during the first nine months of your employment $150 a month, was it not? A. Yes, sir.

Q. You did not give all of your time to it?

A. I gave all the time that it required.

Q. All that was necessary to do what you thought should be done for the Company?

A. To do what was necessary.

Q. In October, 1903, your salary was raised to $200 a month? A. Yes, sir.

Q. And you received the $150 a month from the time of your first election as Secretary and Treasurer of the Company, up to the time that your salary was

(Testimony of R. P. Dunlap.)

raised to $200 a month, did you not? A. I did.

Q. And from October 15th, 1903, up to the time of your resignation as Secretary and Treasurer, up to the time that that resignation took effect, upon February 21st, 1905, you received the $200 a month, did you not? A. Yes, sir.

Q. Did you receive anything else from the Company during that time? A. No, sir.

Q. You received no transfer fees at any time?

A. Yes, sir, from October 10th.

Q. From October when?

A. From October, 1903, up till the date of my resignation.

Q. From October, 1903, to February 21st, 1905, then you did receive additional compensation?

A. Yes, sir, I received the transfer fees, they were part of the compensation, I had forgotten that.

Q. You received the $200 a month anyway?

A. Oh, yes, sir.

Q. And the transfer fees in addition to that?

A. Yes, sir, that is right. **[65]**

Q. How much did those transfer fees amount to a month?

A. Oh, they ranged from a few dollars to sometimes fifteen.

Q. Sometimes higher, did they not?

A. Possibly, I do not recall.

Q. Sometimes as high as forty-five or fifty?

A. No, I don't know that that ever occurred.

Q. You would not swear that it did not?

(Testimony of R. P. Dunlap.)

A. Oh, no, and I won't swear that it did, but my impression is that it did not anywhere near reach that.

Q. But it might have?

A. Oh, it might have, yes.

Q. You asked for a substantial raise in salary prior to your resignation in 1905, did you not?

A. No, sir, I do not recall that I did.

Q. Don't you recall being at a meeting in Salt Lake in the fall of 1904, the annual meeting?

A. Yes, sir.

Q. You were there? A. Yes, sir, I was there.

Q. You recall the directors' meeting which was held immediately after that meeting? A. Yes, sir.

Q. Do you recall having asked Mr. Knox, or telling Mr. Knox that you were unwilling to give your services to the Company any further for $200 a month, and you wanted $300 a month?

A. No, sir, I do not recall it

Q. It may have occurred, however, Mr. Dunlap?

A. Well, I hardly think it occurred.

Q. Well, if Mr. Knox should swear to that you would not be prepared to deny it, would you?

A. If Mr. Knox will swear it, I will believe it.

Q. And Mr. Knox told you at that time that the Company would not entertain such a proposition as to pay you $300 a month?

A. I do not recall that conversation at all. **[66]**

Q. But, anyway, was not your resignation as Secretary and Treasurer of the Company the result of

(Testimony of R. P. Dunlap.)

your asking for this increase in salary?

A. No, sir.

Q. Was your resignation voluntary on your part?

A. It was,—yes, it was voluntary on my part.

Q. I know, when you wrote it out, but was it ever suggested by anybody that you should resign?

A. No, sir, but it was made so unpleasant for me that I did not care to remain.

Q. And it was suggested that when the Company's offices moved up on the hill, early in 1905, that you had better remain down in the town, was it not?

Mr. SUMMERFIELD.—I object, if the Court please, on the ground it is not in cross-examination, and does not meet any of the issues in this case.

Mr. THAYER.—It is certainly a part of the whole scheme. This man has testified, as I understand, to one of the last questions, that he has been practically the prime mover of the Montana-Tonopah Company, and these questions go to that fact, and that character of proof.

The COURT.—To what time does this refer?

Mr. THAYER.—The question relates to his resignation as Secretary and Treasurer of the Company, which took effect on February 21st, 1905.

The COURT.—The objection is sustained. You may have an exception.

Q. Well, in any event, you did not go up on the hill with the officers of the Company?

A. I certainly did.

Q. At that time? A. Yes, sir.

(Testimony of R. P. Dunlap.)

Q. You lived up there?

A. No, sir, there was no place to live **[67]** up there right at that time.

Q. You did not have your office with the office of the Company up on the hill, did you? A. Yes, sir.

Q. You did not have any office down town?

A. I did have an office, and retained the same place where I had been living, my rooms and all were right together.

Q. But your office was down in the town of Tonopah, was it not?

A. Yes, I had an office down town.

Q. And that is where you spent your time?

A. No, sir.

Q. What did you do in that office?

A. Well, I attended to my own affairs, personal affairs.

Q. You did not attend to the business of the Company down town?

A. I attended to whatever was necessary to be attended to down town; there was lots of it down there at that time.

Q. You were a director all of the time from the fall of 1903 up to the time of your resignation, in 1910?

A. Yes, sir.

Q. And from October or September of 1905, you were elected second Vice-President of the Company, were you not?

A. Well, I was elected first Vice-President that year, and second Vice-President the year following,

(Testimony of R. P. Dunlap.)
and continued as such.

Q. So, except for the period between February 21st, 1905, and September, 1905, you were either Secretary and Treasurer of the Company, or a Vice-President of the Company? A. Yes, sir.

Q. Will you state to the Court and jury whether or not as Vice-President, you ever did anything beyond the duties which were accustomed to be performed by the Vice-President of this particular corporation, while he was in Tonopah, or about the property of the Company?

A. While I was there, or the President?

Q. While the President was there?

A. Yes, sir. **[67a]**

Q. What?

A. The negotiations of these settlements which have been referred to heretofore with different parties.

Q. The President never had anything to do with those settlements, Mr. Dunlap?

A. Oh, he has had something to do in some of them as I have testified.

Q. But those were the only matters which you attended to, these settlements, which were duties not usually performed by the President of this corporation while he was on the ground? A. Yes, sir.

Q. Or while he was President; those were the only matters, the settlement of these personal injury and death cases, that you have referred to?

A. Yes, and these other matters.

(Testimony of R. P. Dunlap.)

Q. Well, what other matters?

A. Well, the patent matters.

Q. I am referring to the period you were Vice-President; you were not Vice-President during the patent matters?

A. No, I was not; the tax matters before the Board of Equalization.

Q. Those were the only things then?

A. All that I recall now, yes.

Q. These matters of general interviews and conversations with Mr. Collins and Mr. Alexander, were such interviews and conversations as might be reasonably had with the executive officers of the corporation, were they not?

A. The only ones they should be held with.

Q. Yes, or possibly a director of the corporation. Going now to these personal cases, taking up first the Swope case, is it not a fact, and don't you know it to be a fact, that Mr. Knox went to Independence, Missouri, on his way out from Philadelphia once, and talked with the attorney for the heirs of the deceased?

A. Yes, sir, he told me he did.

Q. You know that to be a fact? **[67b]**

A. He told me so, and I am satisfied it is true.

Q. And you know that the matter was adjusted practically at that time, at that interview with the attorney for the heirs, do you not?

A. No, sir, I do not.

Q. Was there any meeting of the Board of Directors with reference to that settlement? A. Yes, sir.

(Testimony of R. P. Dunlap.)

Q. Any resolutions passed? A. Yes, sir.

Q. Did that resolution—I have forgotten the date of that, can you tell me?

A. That was January 6th, 1908, or 1909, I don't know which.

Q. January 6th, 1908?

A. I think that is it, Mr. Thayer.

Q. Do you know whether or not that resolution directed Mr. Knox to open negotiations and make a settlement at that time?

Mr. SUMMERFIELD.—Objected to upon the ground if there is such resolution that it is within the possession of the defendant, and is the best of evidence.

Mr. THAYER.—I did not ask what the resolution was; I asked if he knew whether or not the resolution directed?

The COURT.—He can answer the question simply yes or no.

A. I don't know.

Mr. THAYER.—I desire to offer in evidence the resolution beginning with the words "Whereas Thomas H. Swope" on page 83 of Defendant's Exhibit "A."

Mr. SUMMERFIELD.—I object to the introduction of evidence of the proposed minutes, if the Court please, upon the ground they are entirely immaterial to any issue in this case; and further upon the ground that the resolutions consist in the main of self-serving declarations by the defendant Company;

(Testimony of R. P. Dunlap.)

and further, upon the ground that in the main they contain no statement of facts, but merely conclusions of the defendant Company. **[67c]**

Objections sustained. Defendant excepts.

Mr. THAYER.—The book has not been marked, it should be marked Defendant's Exhibit "A."

Q. Did Mr. Knox arrange with Mr. Paxton, the attorney for the Swope heirs, in Independence, Missouri, as to the terms of the settlement, do you know whether he did or not?

A. My impression is that he conferred with them in regard to it, and that it was finally settled by correspondence between Mr. Paxton and myself.

Q. Do you not know that Mr. Knox while at Independence, Missouri, agreed with Mr. Paxton on the terms of that settlement? A. No, sir, I do not.

Q. Do you know that the terms finally agreed upon and suggested by Mr. Knox at that time, were that the Company should pay the surgeon's bill of $500?

A. I know that those were the terms on which we decided at the directors' meeting, that it should be done.

Q. Do you know whether or not the suggestion came from Mr. Knox? A. I do not.

Q. You know that it did not emanate from you, Mr. Dunlap?

A. I do not recall it, because we talked it all over together at the meeting.

Q. But you know the suggestion did not come from you?

(Testimony of R. P. Dunlap.)

A. I don't know that it did not come from me.

Q. If it had you would remember it?

A. Not necessarily; a great many things have come from me in this matter that I don't remember.

Q. This is one of the few things that you testify to directly. Did the Company pay Doctor Hammond's bill for services in this case?

A. They arranged it so they would pay Dr. Hammond's bill. **[67d]**

Q. Answer the question yes or no? A. It did.

Q. Who made that payment?

A. It was made through the bank of Independence, the Cressman & Sawyer Banking Company of Independence, Missouri.

Q. Paid by Mr. Alexander?

A. Paid by the Secretary.

Q. Was he Secretary at that time? A. Yes, sir.

Q. Did Mr. Alexander arrange with Doctor Hammond for a reduction of his bill? A. No, sir.

Q. He did not? A. No, sir.

Q. You know positively that Mr. Alexander never spoke to Doctor Hammond about it?

A. I do not know that he did not speak to Doctor Hammond about it; I know that I arranged for it.

Q. Do you know positively that he did not speak to Doctor Hammond about that? A. No, sir.

Q. You do not know? A. No, sir.

Q. He may have done so? A. Yes, sir.

Q. And this interview between Mr. Paxton, the attorney for the Swope heirs, and Mr. Knox in Inde-

(Testimony of R. P. Dunlap.)

pendence, Missouri, was prior to the correspondence which you state you had with Mr. Paxton, was it not?

A. It was subsequent to some of it.

Q. But for the greater part it was prior?

A. I don't know that it was the greater part.

Q. Going to the settlement of the Ursin case, and Schmeig, concerning which you testified yesterday, in 1907; do you know where Mr. Knox was when that accident occurred? A. No, sir, I do not.

Q. Was he in Tonopah?

A. I do not recall, I think not.

Q. Was Mr. Collins in Tonopah?

A. I believe so. **[67e—68]**

Q. Mr. Collins was general superintendent of the Company at that time, was he not? A. Yes, sir.

Q. Do you know whether Mr. Collins had anything to do with the settlement of the matter?

A. I am satisfied he did not.

Q. You are satisfied equally, I suppose, that Mr. Knox had nothing to do with it?

A. Will the Court permit me to tell why I know these things?

The COURT.—No, just simply answer the question.

Q. Did you answer the question?

A. No, I do not recall it now.

(Question read: You are satisfied equally, I suppose, that Mr. Knox had nothing to do with it?)

A. Mr. Knox was present when it was made, but took no part in the discussion.

(Testimony of R. P. Dunlap.)

Q. Where did the settlement take place?

A. In my office.

Q. In your office? A. Yes, sir.

Q. There was no conversation in Mr. Bert Gibbon's office? A. Not that I know of.

Q. You were not present at that? A. No, sir.

Q. What was the claim of Mr. Ursin, what was the amount of his claim?

A. Well, I am informed by Mr. Ursin and Mr. Gibbons that it was $15,000, that is the only way I know it.

Q. You don't know whether Ursin offered to settle for a certain sum, of $2,400?

A. No, sir, I do not; he told me he did not.

Q. You don't know whether he made that offer; do you know what was finally paid Mr. Ursin?

A. Yes, sir.

Q. How much was it?

A. As I remember it now, $1100 and a job.

Q. Do you know what the payment was to the other man, Schmeig?

A. I think it was six months pay in advance and $750. **[69]**

Q. He was paid that? A. Yes, sir.

Q. Who was present when the proposition to pay Ursin $1150 was made?

A. Mr. Knox, Mr. Gibbons, Mr. Ursin and Mr. Schmeig.

Q. Who made the proposition? A. I did.

Q. To pay the $1,150? A. Yes, sir.

(Testimony of R. P. Dunlap.)

Q. How did you arrive at that figure?

A. Well, we figured that he would be disabled for a certain length of time, that he could not go to work; he had already been out of employment for a certain length of time, and at the wage he was drawing it would amount to about that and then he was to have a job from that time on.

Q. Give it in detail how you arrived at the figure of $1,150?

A. At $125 a month, or four dollars a day, the rate at which he was paid, it would require so many days of idleness to be compensated for, and that can be easily calculated.

Q. How many days?

A. I don't know, sir, I can figure it for you.

Q. You figured on how many days he would be idle?

A. Had been idle and before he could take up his job as watchman, added together.

Q. And it came to $1,150?

A. I don't think that it came to that exactly, but that was the amount agreed upon.

Q. Mr. Knox did not make this suggestion himself, you made it? A. As I remember it, I made it, yes.

Q. So if Mr. Knox states that he made the suggestion and fixed upon that amount, that the matter of settlement was left in abeyance until he returned from Philadelphia to Tonopah, he is mistaken, is he?

Mr. SUMMERFIELD.—I object to the form of the question, as being vicious under the law. **[70]**

The COURT.—I do not think he should be cross-

(Testimony of R. P. Dunlap.)

questioned on another witness's testimony prior to its being given.

Q. Do you know whether Mr. Collins had any correspondence, or sent any telegrams or communications to Mr. Knox in his absence, at the time of this accident? A. I do not.

Q. When did you first begin to participate in the discussion or negotiations leading to the settlement of this case, of the Ursin case?

A. While the boys were still in the hospital.

Q. Where were you living at that time?

A. Tonopah.

Q. Well, what place in Tonopah?

A. I was living at the Montana Club.

Q. Up on the hill at the mine?

A. Up on the hill at the mine.

Q. Did Mr. Collins ever talk with you about it up there?

A. I do not recall it, but it would be very natural if he did, very likely he did.

Q. In interrogating you with reference to the Swope matter, that was not a death accident, it was the loss of an arm, was it not? A. Yes.

Q. So there were no heirs, and the negotiations were made on behalf of the person who was injured?

A. That is right.

Q. Samuel Merton was killed, was he not?

A. Yes, sir.

Q. Where were you living at that time in Tonopah?

A. At the Montana Club, up at the mine.

(Testimony of R. P. Dunlap.)

Q. What was the nature of that accident?

A. He was killed on a cage coming up from the lowest level, as I remember it now, when the night shift came off at two-thirty.

Q. What did you do with reference to that settlement, the settlement of the claim for damages resulting from that accident?

A. I got a voucher receipt in full from the father of Sam Merton, **[71]** with the understanding that that ended the matter right there.

Q. Did you negotiate that settlement? A. I did.

Q. Did anyone make any suggestion to you about it? A. I do not recall that anyone did.

Q. Was anyone present at any conversations relating to the settlement?

A. No one but Mr. Merton's son in law.

Q. No one in connection with the Company?

A. No, sir.

Q. Were you at the mine when the accident occurred? A. Yes, sir.

Q. What was the first thing you did?

A. After I was notified of it, was to call the coroner.

Q. Who notified you? A. Mr. Collins.

Q. Was Mr. Collins at the mine?

A. He was sleeping in the room next to me, and somebody notified him.

Q. Just a moment.

A. Yes, sir, he was at the mine.

Q. He was at the mine when the accident occurred?

(Testimony of R. P. Dunlap.)

A. Yes, sir.

Q. Where did Mr. Collins live at that time?

A. Whenever he was in Tonopah he lived up at the mine.

Q. He did not have a house away from the property at the time of this accident, did he?

A. He had a house, and has it yet.

Q. But he was not living at the house at the time of this accident? A. No, sir.

Q. So it is not a fact that someone, other than yourself, at the mine, telephoned Mr. Collins at his house about this accident to Samuel Merton?

A. My recollection is that he was at the mine that evening, that night, and spent the night there.

Q. You have stated positively that he was?

A. That is the best of my belief. **[72]**

Q. And it is not a fact that someone telephoned him at his house with reference to the accident?

A. Now, you are refreshing my memory, and if you will allow me I will correct my statement.

Q. Just answer the question, and if you have any explanation to make, make it.

The COURT.—You can answer the question, and make an explanation afterwards, if you desire.

(Question read by reporter.)

A. I think it is a fact. Now, Judge, may I?

The COURT.—You may correct your statement if you wish.

A. My statement with regard to Mr. Collins being on the hill and in a room adjoining mine at this time;

(Testimony of R. P. Dunlap.)

it was not at the time of the Merton accident, but a subsequent one, when a party committed suicide at the mine, and he was notified by the night shift-boss, and he and I talked it over, and I telephoned to the coroner at the time; so Mr. Collins was likely at his home at the time of the Merton accident; I have confounded the two.

Q. Don't you know that Pengelle telephoned Mr. Collins first, apprising him that Merton was killed?

A. Yes, sir, that is a fact.

Q. He telephoned him first? A. Yes, sir.

Q. And notified Mr. Collins to that effect?

A. Yes, sir.

Q. And that you took the telephone receiver from Pengelle and continued the conversation with Mr. Collins upon your own volition; is not that a fact?

A. If I talked to him at all, and I think I did, it was because I was willing to, yes.

Q. You did it of your own volition; you were the only executive officer of the Company there at that time, were you not? **[73]**

A. Yes, sir.

Q. And you took the responsibility of doing that?

A. Yes, sir.

Q. And what was the conversation that you and Mr. Collins had over the phone, after you took the receiver from Pengelle?

A. I do not recall, only something was said about notifying the coroner.

Q. Mr. Collins made the suggestion, did he not, that he would notify the coroner?

(Testimony of R. P. Dunlap.)

A. I do not remember who made it.

Q. And didn't you say, "Dismiss that from your mind; I will attend to all of that?"

A. I do not remember that, but I attended to it.

Q. You may have said it? A. I may have.

Q. And you said it voluntarily?

A. I do not think anybody made me do it.

Q. And you were not requested to do it by Mr. Collins?

A. To make that statement, no; he did not request me to make the statement.

Q. Just a moment. You were not requested to see the coroner by Mr. Collins, you made the suggestion voluntarily that you would see the coroner, and he could dismiss that from his mind, did you not?

A. I do not recall, but I said I would see him.

Q. Will you answer the question?

A. I do not remember.

Q. You may have done that?

A. Why, of course I may.

Q. And if you did it, it was an entirely voluntary suggestion on your part as an executive officer of the Company, and in the scope of your duties in that position at that time, as you thought?

Mr. SUMMERFIELD.—I object upon the ground that it calls for the conclusion of the witness as to a matter of law rather than a matter of substantive evidence. **[74]**

Mr. THAYER.—If this plaintiff can recover at all for services rendered to this corporation while he was a director or an officer of the corporation,

(Testimony of R. P. Dunlap.)

compensation must be recovered because there was an understanding, or belief, or agreement upon his part that he was going to be compensated, and an understanding, agreement or belief on the part of the corporation that he was going to be compensated; and the question goes to show his attitude, his frame of mine, at the time these services were rendered; and for that reason I think the question is proper.

The COURT.—You may ask the question as to whether he believed he would be compensated; but as to whether he believed it was within the line of his duty or not, I would like to have your authority, as to whether he can pass upon that matter. The balance of the question may be deferred until later, if you wish.

Q. What compensation did you expect to get for this particular service, Mr. Dunlap?

A. I did not itemize it in my mind.

Q. You did not? A. Why, no.

Q. Did you have that idea in your mind, the idea of compensation, when you rendered this particular service? A. No, sir.

Mr. SUMMERFIELD.—Wait a moment. I ask the answer be stricken out until I can make an objection.

(Answer stricken out.)

Mr. SUMMERFIELD.—I object to the question in the form in which it is propounded, if the Court please, upon the ground that in a case of this kind and character, it is not material that a person have in his mind at the time what compensation he is

(Testimony of R. P. Dunlap.)

going to get for any particular service, if the services are of such a character, outside of the scope of his employment, and he believed, or had reason to believe, under a course of conduct, that he [75] would be compensated for such services; under the law it is not necessary, as I understand it, that he should frame a bill of particulars in his mind and keep that in view upon every occasion.

The COURT.—I agree with you so far; but it seems to me it is a question that he can go into, as to whether these services were purely voluntary or not; whether he intended to contribute them to the Company, or whether he expected to be compensated for them in some way. It is a question as to whether the services were voluntary or involuntary, and I presume that is the intent.

Mr. THAYER.—That was the purpose of the question.

The COURT.—That word "voluntary" is not used in the sense in which you used it, Mr. Dunlap; whether you rendered those services expecting to be compensated in some way for them, or whether you intended them as a gift. If you intended them as a gift and did not expect compensation, they would be voluntary, in the sense in which I have used the term.

WITNESS.—With the interpretation of the term by the Court, that answer should be qualified.

Mr. THAYER.—Qualify it.

A. I expected compensation for every service I rendered.

(Testimony of R. P. Dunlap.)

Q. You were performing the same services that the President of the Company did when he was there; you were performing the same class of service as the President of the Company did when he was in Tonopah, were you not? A. Yes, sir.

Q. Exactly the same class of services?

A. Yes, sir.

Q. You were acting as President in the absence of the President were you not? A. Yes, sir.

Q. In all of those services? A. Yes, sir.

Q. Was the President receiving any compensation for his services during that time, during that period?

A. He was not. **[76]**

Q. Has he ever, up to a year ago in September, received compensation for his services?

A. He has been proffered compensation.

Q. Has he ever received compensation for his services, can you answer the question yes or no?

A. Yes.

Q. How much compensation has he received?

A. Five thousand dollars.

Q. That was for services, was it?

A. I presume so, it was for general services and expenses.

Q. Don't you know it was for disbursements that he had made in connection with the Company, Mr. Dunlap? A. I know this, that at the time—

Q. Answer the question, please?

A. No, sir, I do not.

Q. If the minutes show that was for disburse-

(Testimony of R. P. Dunlap.)

ments, the minutes are mistaken, are they?

(Objected to as improper. Objection sustained.)

Q. You don't know that that was for disbursements made by Mr. Knox? A. No, sir.

Q. Mr. Knox was President during all of this time, was he? A. Yes.

Q. And these services were rendered by you in his absence? A. Yes, sir.

Q. When did the question of taxes, or the difficulty between the Company and the Board of County Commissioners with reference to taxes first arise?

A. I think the first time that I recall now was when the mill was taxed in 1907.

Q. Was that at a meeting of the Board of Directors that the question was first presented?

A. I do not recall.

Q. If it was, it was some meeting held in the year 1907, was it? A. I think so.

Q. How did it first come to your attention, that the Company was [77] overtaxed?

A. Why, the knowledge of the amount that the Company was expected to pay on was notice enough to me.

Mr. THAYER.—I think the witness can answer the question.

The COURT.—Read the question. (Question read.)

Q. Through what channel?

A. I dare say through the office.

Q. Who told you?

A. Very likely the Secretary. I don't remember.

(Testimony of R. P. Dunlap.)

Q. The matter was never brought up at any Board meeting?

A. I can't say whether it was or not, I don't know.

Q. Don't you know, that as a matter of fact, it was brought up at a Board meeting? A. I do not.

Q. Don't you know that at that Board meeting, yourself, Mr. Alexander, Mr. McQuillan and Mr. Knox were present? A. No, sir, I do not.

Q. Mr. McQuillan was County Commissioner at that time, was he not?

A. He was County Commissioner; yes.

Q. And don't you know that the matter was brought up at a Board meeting when Mr. McQuillan, who happened to be a County Commissioner at that time, was present?

A. I do not recall that as a fact, it may be true.

Q. Don't you know it was discussed, and the time or the day upon which the Board of Equalization would be in session was referred to at this meeting?

A. If it was discussed at all, that is likely to have come up.

Q. And don't you know that you voluntarily made the remark, "I am going up there anyway on that day, and I will attend to it myself"?

A. No, sir, I do not.

Q. You don't know? A. No.

Q. But you may have made that remark, may you not?

A. There is no reason why I should have gone there except for this matter. **[78]**

(Testimony of R. P. Dunlap.)

Q. Did anyone tell you to go?

A. I do not recall that they did.

Q. You did it voluntarily, did you?

A. I did it in the interest of the Company.

Q. You did it in the interest of the Company?

A. Yes, sir.

Q. Did anyone connected with the Company suggest that you be paid for performing that service?

A. At that particular time, that particular service?

Q. Yes. A. No, sir.

Q. At any of these times when the Board of Directors was in session, was there any suggestion made with reference to compensation to you for these services which you were claiming to have been rendered?

A. No, sir.

Q. Not at any meeting of the Board at which you were present was that ever brought up?

A. At a meeting of the Board in the early part of 1905, the matter of my pay was brought up.

Q. 1905? A. Yes, it was not acted on.

Q. Was that while you were the Secretary of the Company? A. No, sir.

Q. Did you hold any office besides that of director at that time? A. No, sir.

Q. Nothing was done about paying you anything?

A. No, because when they asked me the question when I was going to get my pay, I said I would have to wait for it, and consequently they took no action.

Q. Does that appear in the minutes of the meeting? A. No.

(Testimony of R. P. Dunlap.)

Q. It was said in a joking manner, was it not?

A. No, I don't think so.

Q. You had no reason to believe that the Board expected to compensate **[79]** you, did you?

A. I had every reason to believe they did, but not at that time.

Q. But nobody ever said they did?

A. They spoke of it just as I have reported.

Q. Just a question of the Company getting out of debt, was it?

A. No, not at that time; the Company was not in debt at that time.

Q. The Company had plenty of money then, did it?

A. Yes, sir; not any great amount of surplus, but they had money.

Q. Even to compensate you?

A. Oh, yes, even that much.

Q. This compensation which was referred to at that time was merely with reference to a director?

A. The directors were not paid.

Q. You had no other title, had you?

A. I was not paid according to title.

Q. You were not paid at all, were you?

A. No, sir.

Q. There was a resolution passed while you were Secretary of the Company, reciting that the directors of the Company should receive no compensation, was there not? A. I don't know, sir; I think not.

Q. Excepting their traveling expenses attending meetings?

A. I do not recall it, very likely that is true.

(Testimony of R. P. Dunlap.)

Q. At the time that the tax matter was taken up with the County Commissioners, the claim for rebate was based upon the fact that the mill had been assessed at its entire valuation, or the valuation fixed during the period of construction, and before the mill was completed, was it not? A. Yes, sir.

Q. And the Board of County Commissioners reduced the amount of valuation, excepting only for the two or three months that the mill had been completed?

A. Or would run during the tax year. **[80]**

Q. Or would run during the tax year?

A. Yes, sir.

Q. The same question was brought up by the Montgomery-Shoshone, was it not?

A. I think so; of course, I don't know about their affairs.

Q. And the Board of County Commissioners as soon as the matter was called to their attention, very gladly made that change, did they not?

A. Well, they made the change, I don't know how glad they were to do it.

Q. Well, there was not a lot of arguing about it, and a presentation of a lot of data; you did not have to do very much to convince them, did you?

A. I did all that was necessary,

Q. You didn't have to do very much, did you?

A. I did all I could.

Q. Can you answer the question yes or no?

A. Yes.

Q. Well, what did you do, how long did it take

(Testimony of R. P. Dunlap.)

you? A. I do not recall, probably an hour.

Q. You had to do a good deal during that hour, did you? A. You bet I did.

Q. Notwithstanding that the Board of County Commissioners were ready to accede to the request just as soon as their attention was called to the condition?

Mr. SUMMERFIELD.—I object to that as involving a conclusion of counsel, pure and simple, and concerning which there has been no testimony whatever.

Mr. THAYER.—I withdraw the question.

Q. Do you know whether the Montgomery-Shoshone Company had a representative there before the Board of County Commissioners at that time?

A. Not while I was there; they had had.

Q. And that their claim was along the same lines as that of the Montana-Tonopah? A. Yes, sir.

[81]

Q. Was the request of the Montgomery-Shoshone granted while you were there before the Board?

A. No, sir.

Q. Did you ever see a representative there?

A. Of the Montgomery-Shoshone?

Q. Yes. A. No, sir.

Q. You don't know then whether there was one there or not? A. No, sir.

Q. At any time?

A. No, sir, I was told by the Commissioners that he had been there.

Q. You referred to the reduction of the taxation

(Testimony of R. P. Dunlap.)
in 1908, on the spur of the Montana-Tonopah Company. As I understand that, the services rendered were on the ground that the Board of County Commissioners had listed this spur as railroad property, and it was also included in the valuation of all of the surface improvements, was that correct?

A. Yes, sir.

Q. So that the spur was taxed twice?

A. Yes, sir.

Q. Did it require a very arduous argument upon your part to convince the Board of County Commissioners that they should not tax that property twice?

A. The list—

Q. You can answer the question yes or no, Mr. Dunlap.

A. I don't know that it was especially arduous.

Q. How long were you there at that time?

A. Well, probably an hour or two.

Q. Did you have to do anything more than to call the attention of the Commissioners to the fact that the railroad property was listed twice for taxation?

A. Yes, sir.

Q. They were not willing to rebate it or to deduct it from the general schedule when you called attention to the fact that it appeared in both schedules?

A. Not until I had combated the arguments of the deputy assessors; [82] Mr. Thomas Marshal, he was there and made quite an argument that it should be listed separately, because they had had instructions from the State Board of Equalization to that effect; and there were two or three other passages

(Testimony of R. P. Dunlap.)

and arguments before it was acceded to.

Q. They wanted to tax that twice, did they?

A. I don't know whether they wanted to tax it twice, but it took argument to convince them that it was already included in the surface improvements, and was intended to be included.

Q. Did it appear upon the schedule?

A. No, sir, they did not itemize them.

Q. Who made out the schedule?

A. The Secretary.

Q. You did not do that? A. Oh, no.

Q. In 1906, after the San Francisco fire, you stated that many stock certificates were destroyed by the fire, and that you prepared an indemnity bond for the Company; that is correct, is it not?

A. You will find that I have collaborated with the attorney, Mr. Brown, in the preparation of that.

Q. Oh, you did call in Mr. Brown?

A. No, sir, I went to his office to see him.

Q. Mr. Brown had very little to do with preparing that bond, I assume?

A. Oh, no, Mr. Brown had a good deal to do with it.

Q. You revised it after Mr. Brown finished it?

A. No, sir.

Q. Well, who prepared the bond, Mr. Dunlap?

A. Mr. Brown and I.

Q. What did you do with reference to preparing it?

A. Consulted with Mr. Brown in regard to the terms.

(Testimony of R. P. Dunlap.)

Q. What terms did you suggest in that bond for indemnity for lost stock?

A. I don't know now, I cannot recall.

Q. Did you suggest any terms?

A. Yes, sir. **[83]**

Q. What were they? A. I don't know now.

Q. Have you a form of bond that you prepared?

A. No, sir.

Q. Who did the most of the work in the preparation of that bond, you or Mr. Brown?

A. I will say Mr. Brown did it.

Q. Did you think it was necessary to call Mr. Brown in for the preparation of that bond?

(Objected to as calling for the mere conclusion of the witness. Objection overruled.)

A. I thought it was safer.

Q. Did you talk with Mr. Alexander about the preparation of the bond?

A. I talked with him at the office about it.

Q. You were signing some stock certificates at that time, were you not, as Vice-President of the Company? A. Yes, sir, signed what were to be signed.

Q. And this question came up in connection with the issue of stock, did it not? A. Yes, sir.

Q. Did you seek out Mr. Alexander and discuss with him this matter, or did he go to you about it?

A. I do not recall.

Q. Do you know whether Mr. Alexander went to Mr. Brown?

A. I do not remember, but I believe he did.

(Testimony of R. P. Dunlap.)

Q. You do not know how much conversation Mr. Alexander, as Secretary of the Company, had about it? A. No, sir, I do not.

Q. But you rendered your services as assistant to Mr. Brown in the preparation of the bond?

A. Well, you might call it that, I guess.

Q. Mr. Brown was paid, was he, for preparing that bond, do you know?

A. He was the retained attorney of the Company.

Q. Can you answer the question, Mr. Dunlap?

A. He was paid a yearly fee.

Q. This came within the scope of his duties, then, to prepare **[84]** this bond?

A. I think so, yes, sir.

Q. It was not absolutely necessary, then, for you to be there with him, was it? Mr. Brown is considered a very competent attorney all over the State of Nevada, is he not? A. Yes, I thing he is.

Q. You think your services were necessary then, to Mr. Brown in the preparation of this indemnity bond for lost stock?

Mr. SUMMERFIELD.—Object to the question on the ground it is calling merely for the thought of this witness, for his conclusion about it, and that the testimony is not evidentiary, and could not be evidentiary.

Mr. THAYER.—It goes to the necessity of his services, as involving a compensation.

The COURT.—He may answer the question, and may explain it if he wishes to.

(Testimony of R. P. Dunlap.)

A. Mr. Brown very gladly accepted my assistance in the matter, and we conferred about it on two or three different occasions before it was completed, and when it was completed he called me over to his office, before the final draft was made, and we went over it together.

Mr. THAYER.—Will you read the question, please?

(Question read by reporter.)

Q. That is the question, Mr. Dunlap.

A. Not absolutely necessary.

Q. You think that Mr. Brown could have prepared as good a bond without your assistance as he did with it? A. Very likely.

Q. Your services then, were entirely gratuitous in connection with the preparation of this indemnity bond, and so far as the defendant corporation is concerned, those services were useless? **[85]**

Mr. SUMMERFIELD.—Object to the question in both phases of its dual character; first, as to whether or not they were gratuitous calls for a mere conclusion; and, second, whether or not they were useless, calls for a mere naked opinion.

The COURT.—I am inclined to think so, too; but I will allow the question, as he does state that he went there and consulted with him, and now he may state how he regarded the services, whether he regarded them as of any value or not. That is the gist of the question, though it is put in different form.

(Question read.)

(Testimony of R. P. Dunlap.)

A. No, sir, I don't consider them useless.

Q. You said that Mr. Brown could have prepared just as good a bond without your assistance?

A. That is my opinion of Mr. Brown's capacity.

Q. Yes. Then what was the necessity of your assistance? Why were not your services useless?

Mr. SUMMERFIELD.—I object to the question, if the Court please upon the ground that Mr. Brown might have been able to have done it in a week's investigation, and just as good; he might have done it in a much shorter time with the advice of a practical man.

The COURT.—It seems to me the witness ought to be able to state if it is a fact, who or how his services there were of use to the Company.

A. Shall I answer it that way, Judge?

The COURT.—Well, you will have to answer the question just as it is propounded. You may ask the question again.

(Question read: Then what was the necessity of your assistance? Why were not your services useless?)

A. Mr. Brown required some information as to the practical method employed in the issuance, and the records kept, and general conditions [86] appertaining to the transaction, and I gave them to him.

Q. Do you know whether this is the first time that Mr. Hugh H. Brown had ever prepared an indemnity bond for lost stock? A. I don't know.

Q. Do you know whether or not Mr. Brown was

familiar with stock issues and stock transactions of corporations? A. I think he is.

Q. You know he is, don't you?

A. Yes, it is a fair presumption.

Q. Did you ever sign any notes for the Company?

A. Yes, sir.

Q. They were authorized? A. Yes, sir.

Q. By the Board of Directors? A. Yes, sir.

Q. You signed them as Vice-President, did you not? A. Yes, sir.

Q. And entirely what you then supposed to be within the scope of your duties as Vice-President of this corporation, did you not?

A. Whenever I signed an article as Vice-President I considered it that way.

Q. You looked upon it entirely as within the scope of your duties as Vice-President?

A. I should never have done it otherwise.

Q. And if Mr. Knox had been there he would probably have signed it in your place, would he not?

A. He did sign some.

Q. And you signed them when and because he was absent usually, did you not?

A. I don't know that he signed any in Tonopah; what he did sign was signed in San Francisco.

Q. And Mr. Knox was serving at that time without compensation, was he not? A. Yes, sir. [87]

Q. He was? A. Yes, sir.

Q. The five thousand dollars that you refer to as having been paid by the Company to Mr. Knox was

(Testimony of R. P. Dunlap.)

paid in a lump sum, was it not? A. Yes.

Q. You don't know whether it was for compensation or for disbursements?

A. It was supposed to be for both.

Q. When were your services rendered with reference to securing patents for the Company?

A. In 1903.

Q. Who was the land attorney for the Company?

A. A gentleman by the name of Parks appeared here in Carson, that is the only time I ever saw him.

Q. Where did he reside? A. Salt Lake City.

Q. Mr. Clarks of Salt Lake City?

A. Mr. Parks.

Q. He was the attorney for the Company with reference to securing the patent?

A. He was representing, I think, Dixon, Ellis & Ellis, the attorneys.

Q. He was a clerk in their office, was he not?

A. I think not.

Q. And came out here for them?

A. Yes, sir, he came out here for the purpose.

Q. Dixon, Ellis & Ellis were large stockholders in the Montana-Tonopah, a firm of attorneys in Salt Lake City of considerable prominence? A. Yes.

Q. And they were doing the legal work for the Company with reference to securing the patent?

A. Yes.

Q. And Mr. Parks was sent out here for that purpose? A. Yes.

Q. Was there any lawyer employed in Washing-

(Testimony of R. P. Dunlap.)

ton? A. Horace F. Clarke.

Q. Do you know who employed him?

A. Mr. Knox.

Q. These services were rendered in what part of 1903? [88]

A. Running all the way from July to the end of the year.

Q. At the time that you rendered those services, did you say anything to Mr. Knox, or to the Board of Directors in session, with reference to compensation for those services? A. No, sir.

Q. Why didn't you?

A. I had assurances—no, I won't say that at all. I did not say anything about it at the time, because I figured, as Mr. Knox had said to me—will you allow me to tell that?

The COURT.—Go on unless there is an objection.

Q. As long as it answers the question I don't care what you say.

A. Mr. Knox and I talked over the mining situation, I said I was green in it, and he said there was no class of business that paid as well as a good mine when it was on its feet and in good shape, and while we might be working along now at seemingly and insufficient pay, that the time would come when all matters would be made right.

Q. What time in 1903 was it when you had this conversation with Mr. Knox?

A. Some time in 1903, I don't remember just the time, along probably from the annual meeting of 1903, I think.

(Testimony of R. P. Dunlap.)

Q. And after September of 1903? A. I think so.

Q. Your salary was raised in October of 1903?

A. Yes.

Q. Mr. Knox was not present at the meeting at which your salary was raised, was he? A. No, sir.

Q. You never made any claim for special services rendered in securing the patents, in connection with that? A. I did not.

Q. When did you first speak of that to the Board of Directors; when did you first ask for compensation from the Board of Directors for rendering those services?

A. The 15th day of February, 1910. **[89]**

Q. When did you ever talk or suggest to the Board in session, that you should be compensated for the services in securing patent? A. On that date.

Q. That was seven years, practically, after the services were rendered, was it not?

A. Well, it was February, 1910.

Q. Do you know whether or not the corporation expected to pay you for those services?

A. I felt that they did.

Q. Do you know whether they expected to, Mr. Dunlap?

A. It is pretty hard to know what a corporation expects to do.

Q. Yes, it sometimes is. Well, do you know?

A. I know part of the members of the Board did.

Q. Don't you know that when you resigned as Secretary of the corporation, that the corporation

(Testimony of R. P. Dunlap.)

itself, and you, yourself, believed that your salary, and your transfer fees having been paid you, that you had been entirely compensated for the services that you rendered up to that time? Now is not that a fact?

A. No, sir, I don't think that is a fact.

Q. Didn't you think so yourself? Did you contemplate any compensation for past services? Now you may be a little prejudiced at the present time, but throw your memory back to that date, and see if you can answer that question frankly, that you expected any further compensation for the services which you had previously rendered, when you resigned?

A. At that very meeting was when the question was put to me, when do you expect to get your pay, and I said, I will have to wait for mine.

Q. That is not an answer; and I ask that it be stricken and the question repeated to the witness.

The COURT.—Cannot you answer the question yes or no?

A. If you will state it as clearly as it ought to be, I am satisfied [90] I can answer it; but there are so many variations of it, I feel like it ought to be answered that way.

Mr. THAYER.—I withdraw the question.

Q. Can you remember whether or not on the date of your resignation in 1905, you expected to receive further compensation for past services?

A. I certainly did.

Q. What induced you to expect that?

A. Conversations with the President and general

(Testimony of R. P. Dunlap.)

manager of the Company in regard to matters of that kind.

Q. And nothing else? A. Nothing else.

Recess until 1:30 P. M.

AFTERNOON SESSION—1:30 P. M.

Q. At the time that your resignation was presented as Secretary and Treasurer, the resignation was really presented in the fall of 1904, was it not, Mr. Dunlap? A. Yes, sir.

Q. And accepted to take effect about the middle of February, or the 21st of February, 1905?

A. It was accepted to take effect in January, but it didn't really take effect until February.

Q. And the resignation was tendered some time in September or October, or November of 1904?

A. My impression is that it was the latter part of November.

Q. The conversation you had with Mr. Knox, from which you inferred that you were to receive additional compensation for your services as Secretary and Treasurer, took place when?

A. Well, as I have testified before, on numerous occasions, but I of course cannot give the date; I did not charge my memory with dates.

Q. You testified to some particular occasion this morning?

A. I did; the last conversation that we had in reference to that I identified, because I happen to remember it. **[91]**

Q. Perhaps the question is not clear, the conver-

(Testimony of R. P. Dunlap.)

sation relating to your compensation solely as Secretary and Treasurer.

A. Oh, that was a matter the directors settled, as Secretary and Treasurer.

Q. I may be mistaken, but as I recall it, you testified to some conversation had with Mr. Knox, from which you inferred that you should expect additional compensation as Secretary and Treasurer before you resigned?

A. No, sir, not as Secretary and Treasurer.

Q. Nothing at all?

A. Nothing additional as Secretary and Treasurer.

Q. The only conversation you now wish to be understood as referring to explicitly was that which occurred in 1908; the other conversations you cannot recall the times and places?

A. I cannot recall the times, no, sir.

Q. At the time your resignation was accepted, and you made the remark that you would have to wait for your compensation, that incident occurred about February of 1905, or in the fall of 1904?

A. I do not recall whether it was the meeting when the resignation was accepted, or whether at the time when it took effect, I have forgotten, but one or the other.

Q. Why did you make that remark, that you would have to wait for your compensation?

A. In answer to a question by one of the directors, —I don't think it was a director, it was Mr. Gillis, the general manager, he was not a director.

Q. Why did you give that answer?

(Testimony of R. P. Dunlap.)

A. Because at that time the Company had its plans and specifications for a mill, which called for the expenditure of more money than we had on hand at that time, and we expected to use all the [92] money we had in building the mill, consequently no extra obligations were expected to be discharged.

Q. And that was early in 1905, or the latter part of 1904?

A. One or the other, it was either at the meeting when the resignation was accepted, or when it took effect.

Q. And that the Company needed all of the money that it then had to build the mill? A. Yes, sir.

Q. And that was the reason that you made the remark?

A. Well, that was one of the contributing reasons.

Q. What were the others?

A. Well, the very fact we were trying to build up a big surplus for the purpose of equipping the plant absolutely in the best way possible.

Q. Do you know how much money there was in the treasury at that time?

A. I think about a hundred and seventy-five thousand dollars.

Q. Is it not a fact a dividend was declared about six months afterwards of a hundred thousand dollars? A. Yes, sir, it is a fact.

Q. And you let that dividend go by without claiming any compensation?

A. Certainly; the dividend was the result of a compromise, and resulted in a split, and being at that

(Testimony of R. P. Dunlap.)

time, it didn't last long, because it split later on.

Q. Well, the Company was out of debt then?

A. Yes, sir.

Q. You had had a previous promise from the Company that they would pay you when the Company was out of debt?

A. No, sir, not from the Company; I had had talks with Mr. Knox along that line, to the effect when we got into a condition.

Q. Am I to understand you, and the Court and jury to understand you, that you had a promise from the Company or from Mr. Knox **[93]** that you would be paid some compensation when the Company was out of debt, the promise being made prior to this date of February, 1905?

A. The first conversation when that took place was prior to that date.

Q. And the Company was out of debt then?

A. It was not stated, Mr. Thayer, I beg your pardon, when the Company was out of debt, specifically, that was to be paid, but that he and I were to be partly compensated for what we were doing when the Company got into condition to do it; after they had equipped their plant and were making money.

Q. Well, the Company was in position to do it then, was it not?

A. Not with the contemplated building of the mill.

Q. But they divided one hundred thousand dollars in dividends? A. They did.

Q. Who was the general manager of the property at that time? A. Mr. Gillis.

(Testimony of R. P. Dunlap.)

Q. Were the specifications for the mill prepared while Mr. Gillis was general manager?

A. I think so.

Q. Not while Mr. Kirby was there?

A. No, sir.

Q. When did Mr. Kirby succeed Mr. Gillis?

A. In August, 1905.

Q. And you are positive in your statement that specifications were prepared while Mr. Gillis was general manager?

A. Yes, I think so; they were prepared by M. L. MacDonald.

Q. And you are positive that the plans and specifications for the mill were all prepared at that time, and they were about to begin the construction of the mill, were they?

A. They were prepared at that time, and they were contemplating the construction of the mill.

Q. You referred in your examination this morning to a time when, **[94]** after the office of the Company had been moved up to the mine, that you maintained an office down town, in Tonopah, for the transacting of your own private business?

A. Yes, sir.

Q. What was that business, Mr. Dunlap?

A. Well, just general mining investments, speculation.

Q. You were trading in stocks a good deal at that time, were you not? A. Yes, sir.

Q. And made a good deal of money, didn't you?

A. I have lost considerable.

(Testimony of R. P. Dunlap.)

Q. Well, you made some; you bought and sold stocks on your own account? A. Yes, sir.

Q. And on those stocks, many of them, you made money? A. Yes, sir.

Q. And that was the business you were transacting?

A. That was the kind of business I was transacting.

Q. Did you receive any business from the fact that you were a director or an officer of the Montana-Tonopah Company?

Mr. SUMMERFIELD.—I object to that question as being incompetent to any issue in this case; it don't state in what nature or what character he would receive it, if he did receive any.

(Objection sustained.)

Q. Mr. Knox threw you a great deal of business, didn't he? A. No, sir.

Q. Not any?

A. We had business together as partners.

Q. Were you a partner with Mr. Knox?

A. In a great many instances, yes, sir.

Q. In what? A. In stocks.

Q. Were you a partner in your business, R. P. Dunlap & Company? A. No, sir.

Q. That was the style under which you transacted business? [95]

A. No, sir, we were not partners; that was the style of the firm name.

Q. Mr. Knox was not a partner of yours in that business? A. No, sir, he was not.

(Testimony of R. P. Dunlap.)

Q. When you say you were partners in many transactions, you referred to the fact that you bought stocks together?

A. We bought stocks together and went into mining deals together.

Q. Did Mr. Knox ever throw any business to you, or make any suggestions to you, or give you any commissions to discharge?

A. No commissions, no, sir.

Q. Don't you remember that he turned over to you an order from Weir, by which Weir & Company said they would pay so much for ten thousand shares of Montana-Tonopah, and that you bought that stock? A. No, sir, I do not.

Q. It is not a fact?

A. Not that I recall; my impression is that it is not a fact.

Q. You are not prepared to say that it is not a fact?

A. To the best of my belief and memory it is not a fact.

Q. Did you buy five thousand shares of Tonopah Mining Company which was up for collateral at one of the banks, at Mr. Knox's suggestion, and afterwards sell it? A. I do not know, sir.

Q. You don't remember?

A. I don't remember; I made a great many transactions, and it is impossible for me to remember.

Q. Well, the point is whether or not Mr. Knox did or did not turn any business to you, and whether or not you received business through connection with the Company.

(Testimony of R. P. Dunlap.)

A. Not through connection with the Company; Mr. Knox and I were on the most friendly terms, and it was the most natural thing in the world for him to do that, if he did it, and he did on several occasions, without doubt. **[96]**

Q. During what periods, if you know, did the Montana-Tonopah Company carry employers' liability insurance?

A. Well, part of the time they carried it; after their unpleasant experience with the London Liability Company in regard to the settlement of the John Mitchell estate, they decided it was a good idea just to carry their own, and that continued, as I recall it, until October 10th, 1907, when, the day of or the day following Mr. Swope's accident, the next policy became operative.

Q. They carried liability insurance during the time of the Mitchell accident? A. Yes, sir.

Q. Why did you not report the matter to the Liability Insurance Company immediately, instead of attending to it yourself?

A. I did report it immediately.

Q. They took no action on it.

A. They wired back that they did not acknowledge any obligation whatever, any liability whatever.

Q. Did you comply with the terms of the policy in making that report?

A. I tried to; I think I did.

Q. They afterwards paid the amount, did they not?

A. Yes, sir, paid the amount that I paid Mitchell.

Q. At the time of the Merton accident, was an em-

(Testimony of R. P. Dunlap.)

ployers' liability insurance carried?

A. I think so, I am not certain, but I believe so.

Q. In what company at that time, do you know?

A. I think it is called the Ocean.

Q. The Ocean Company?

A. The Ocean Liability.

Q. Did not the policy require that the matter of adjustment should be turned over to the Insurance Company?

A. In that particular policy my memory is that they permitted settlements by the assured under certain conditions. **[97]**

Q. And adjustment made afterward?

A. And adjustment under that.

Q. So that the services which you rendered in these cases were really rendered on behalf of, or at least the Employers' Liability Company received the benefit of them, didn't they?

A. I don't consider it that way; I never once had that in view when I was acting.

Q. You say you paid Mitchell's mother?

A. His wife, the widow.

Q. One hundred dollars?

A. Gave her one hundred dollars in cash, yes, sir.

Q. Is it not a fact that Mr. Lynch gave her that money?

A. Mr. Lynch handed it to me; I borrowed it from him right there in her presence; he had the money and I didn't.

Q. But Mr. Lynch did not go down in his pocket voluntarily and give it to the widow?

(Testimony of R. P. Dunlap.)

A. No, he gave it to me and I gave it to the widow, and I gave him a check for it an hour afterwards.

Q. Were there any other accidents occurring at the mine during the time you were a director or an officer of the Company, in the settlement of which you did not participate? A. I don't know of any.

Q. You settled all of them?

A. I was there at the settlement.

Q. You settled all of them yourself, all of the accidents that occurred?

A. As near as I can recall, I participated in all of them.

Q. Do you remember of an accident to the carpenter, Brown? A. Yes, sir.

Q. You settled that?

A. No, sir, I was not in Tonopah; I was in Missouri at the time.

Q. Otherwise, if you had been there, Mr. Dunlap, you would have [98] broken into it, and settled, wouldn't you?

A. I am not a prophet, I cannot tell.

Q. What was the answer?

A. I am not a prophet, I cannot tell what I might have done under the circumstances.

Q. Well, you think you would?

A. I think it is more than likely it would have been brought up to me for the purpose.

Q. While the conspiracy was on to secure a receiver for the Company, did the Company have any attorney at that time?

A. Dixon, Ellis & Ellis of Salt Lake.

(Testimony of R. P. Dunlap.)

Q. During what year was that?

A. I think that was 1904, if I remember correctly.

Q. You were Secretary and Treasurer of the Company at that time? A. Yes, sir.

Q. With whom did you consult with reference to that matter?

A. I consulted with Mr. Thomas Edwards, Mr. George Wingfield and Mr. George Bartlett.

Q. Did any of these gentlemen make any suggestions at all?

A. Oh, yes, sir, it was a general conference.

Q. Mr. Edwards and Mr. Wingfield were not directors of the Company, were they?

A. No, sir, they were both stockholders.

Q. Was Mr. Bartlett a director?

A. No, sir.

Q. Did they give you any advice?

A. Oh, yes.

Q. Did you follow the advice that they gave you?

A. I dare say I followed that part of it that we decided was proper at the conference.

Q. You state that you are suing in this action to recover a salary of $300 per month?

A. No, sir.

Q. Or $250 per month? A. Yes, sir.

Q. You entered the employ of the Company, I believe you said, on January 15th, 1903?

A. Yes, sir. **[99]**

Q. And you severed your connection with the Company on February 21st, 1910? A. Yes, sir.

Q. How many months is that?

(Testimony of R. P. Dunlap.)

A. Well, I don't know, whatever it is.

Q. Well, it is seven years and one month, practically, is it not? A. Yes, sir.

Q. That would be eighty-five months?

A. It sounds that way.

Q. And your complaint is for $24,900.00?

A. I think those are the figures.

Q. How do you explain the discrepancy between the figures you have estimated, and the amount for which you have sued?

A. I don't know that there is a discrepancy; may I see whether there is or not? I did not make the calculation, my attorney made the calculation. (Consults memorandum.) As I calculated it that makes $21,250.00; add to that the amount that I received as Secretary and Treasurer, and deduct then the amount that I received for my duties as Secretary and Treasurer, together with an additional five hundred dollars, which I gave the Company credit for for having occupied a room at the Montana-Tonopah Club for a certain length of time, whatever it is, four years, or about that, and it will leave the net balance, except the difference between the date that I supposed my salary was raised to $200 instead of $150, I thought it was in January.

Mr. SUMMERFIELD.—Do you claim there is a discrepancy?

Mr. THAYER.—Well, it appeared to be so; this perhaps explains it, but I could not understand it.

WITNESS.—That is the explanation.

Q. Were Vermilyea & Bartlett ever attorneys for

(Testimony of R. P. Dunlap.)

the Montana-Tonopah Mining Company?

A. Yes, sir. **[100]**

Q. At what time?

A. I don't just recall the dates.

Q. Were they not at the time this conspiracy was on foot for a receivership, which we have referred to?

A. I hardly think so, but they may have been.

Q. And is it not a fact that they were paid for services in that connection?

A. Not that I know of.

Q. You don't know?

A. My memory is not perfectly clear on that point; I don't think they were attorneys at that time.

Q. They may have been?

A. They may have been, but I don't think they were.

Q. And they may have been paid for these particular services, may they not?

A. If they were, they were paid a retainer of $300 a year.

Q. And if they were retained for these services, these services that they performed, if they did perform any, were embraced by the duties required by that retainer, were they not?

A. Whatever they did would be embraced in it; yes, sir.

Mr. THAYER.—That is all.

[Testimony of W. B. Alexander, for Plaintiff.]

Mr. W. B. ALEXANDER, a witness called by plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. SUMMERFIELD.)

Q. What is your name?

A. W. B. Alexander.

Q. You are residing at Tonopah?

A. Yes, sir.

Q. Do you know the defendant Company, the Montana-Tonopah Company, in this case? A. I do.

Q. You are Secretary of that Company, are you not, Mr. Alexander? A. I am. **[101]**

Q. How long have you been such Secretary?

A. Since June 15th, 1906.

Q. I now exhibit to you, Mr. Alexander, a book, which I understand is the minute-book of the Board of Directors of the Montana-Tonopah Mining Company, and I will ask you if it is the book?

A. It is.

Q. I call your attention to pages 105 and 106, and the first portion of page 107, purporting to be the minutes of the Company under date of February 15th, 1910, and I ask you to examine, and state whether or not those are in the minutes of the meeting of the Board of Directors of that date.

A. They are, on pages 105, 106 and a portion of page 107.

Q. And is that signature to those minutes your signature? A. My signature; yes, sir.

Q. That is a minute of the transactions occurring

(Testimony of W. B. Alexander.)

at that time, is it? A. At that meeting, yes, sir.

Q. I pass to you, Mr. Alexander, a document which I wish you would examine, and after such examination, state if you have any knowledge of the original of that document, and if there is or has been an original thereof. (Hands to witness Plaintiff's Exhibit No. 1, offered for identification.)

A. There is one typographical error in this, which perhaps does not affect it one way or the other; but as nearly as I can remember, I think it is a copy of the original voucher made out.

Q. You notice some misspelled words?

A. Then, too, in here, "which through Mr. Dun" and then "Company" afterwards; it is purely typographical, it does not affect it one way or the other.

Q. With the exception of the typographical error or errors appearing there, is this, in your judgment, a copy of the voucher **[102]** you have referred to?

A. I believe it is.

Q. Do you remember who prepared the voucher?

A. I did.

Q. And to whom did you deliver it, if you know?

A. To Mr. Dunlap.

Q. And then do you know what became of it?

A. He returned it.

Q. He returned it to you?

A. To the office, yes, sir; I think he mailed it.

Q. Mailed it? A. Yes, sir.

Q. And where is it now, if you know?

A. In the office files at Tonopah.

(Testimony of W. B. Alexander.)

Q. Was there any other document returned with the voucher to you at the time?

A. No, I think not; there was a check with it at the time, but I don't think Mr. Dunlap kept the check; I am not quite sure; I think he returned it to me at the time it was tendered, and asked me to look it over, to look over the voucher; that is my recollection of it.

Mr. SUMMERFIELD.—That is all.

Mr. THAYER.—No questions.

[Proceedings Re Reoffer in Evidence of Minutes, etc.]

Mr. SUMMERFIELD.—If the Court please, I now reoffer in evidence in this case that portion of the minutes of the defendant Company under date of February 15th, 1910, commencing with the words "Mr. Dunlap presented" on page 105 of those minutes, to the words "It was moved" on page 106 of the minutes of that date.

Mr. THAYER.—The admission of the resolution referred to is objected to upon the ground that it appears upon the face of the minutes to have been a resolution adopted by the Board of Directors of the defendant Company for the purpose of compromise, or settling the matter in dispute in this action; and that each and every part of the resolution so offered as evidence is a part and **[103]** portion of the offer to compromise the claim which is in dispute in this action. For the further reason that the action authorized by the resolution of the Board of Directors is not binding upon the corporation itself, and that

the corporation is not bound by it for the reason that it is a resolution to do or perform by the corporation an unlawful act.

The COURT.—And that, of course, covers the voucher, also?

Mr. SUMMERFIELD.—Yes.

The COURT.—I shall sustain the objection to the voucher, and I will sustain the objection to all that part of the resolution which is not a statement of fact. There is a part of the resolution which begins "Whereas Mr. Dunlap has rendered certain services," enumerating those services, that portion I am inclined to admit; then there is a paragraph immediately preceding the resolution itself, which I am somewhat in doubt about; for the present I shall exclude that, it consists of three or four lines.

Mr. SUMMERFIELD.—In order to get the record in as concise form as possible, I now offer that portion of the minutes of the Company under date of February 15th, 1910, beginning with the sixth line on page 106, and ending with the twenty-eighth line.

The COURT.—That includes merely the recital of those services, whereas he has rendered certain services?

Mr. SUMMERFIELD.—Yes, and that a certain thing is the sense of the Board.

The COURT.—I am inclined to think that I may allow that in just as you offered it, but for the present I shall not do it. The objection, I suppose, will be made to this just as it was to the first offer?

Mr. THAYER.—Yes, we make the same objection.

The COURT.—That objection will be sustained. **[104]**

Mr. SUMMERFIELD.—I now offer that portion of the minutes of the defendant Company of date February 15th, 1910, commencing with the sixth line on page 106 and ending with the twenty-fifth line.

Mr. THAYER.—We object to the admission upon the ground that it appears upon the face of the minutes to have been a resolution adopted by the Board of Directors of the defendant Company for the purpose of compromise, or settling the matter in dispute, in this action; and that each and every part of the resolution so offered as evidence is a part and portion of the offer to compromise the claim which is in dispute in this action. For the further reason that the action authorized by the resolution of the Board of Directors is not binding upon the corporation itself, and that the corporation is not bound by it for the reason that it is a resolution to do or perform by the corporation an unlawful act.

The COURT.—It seems to me, in that case, there can be a segregation between what is an offer to compromise, and what is a mere recital of fact, and the first paragraph seems to me to be a recital of facts. Of course there is a conclusion there as to the character of service, what the directors regard it to be, whether it is as being within or without the regular duties of the Secretary or of the officer; but the second paragraph of two or three lines, I am rather in doubt as to whether that is not a part of an offer of compromise, and I think where there is a question of

doubt, the doubt should be resolved against the admission.

Mr. SUMMERFIELD.—I desire to read the part which has been indicated, and afterwards I will make a specific offer of the other.

"Whereas at times during the past five years it has been necessary to call upon Vice-President Dunlap to perform in cases of emergency duties other than those usually designated as the duties of Vice-President, such as the exercise of his good offices **[105]** in behalf of the Company in case of accident to employees of this Company, more particularly in the case of John Mitchell, S. Merton and others; his efforts in behalf of the Company in securing a reduction of taxes on the properties of this Company, more particularly the taxes for the year 1907, when the tax against the mill was $3,450, which through Mr. Dunlap's efforts was reduced $862.50, thereby effecting a saving of $2,587.50, and at the same time a reduction of $5,875 in the assessed valuation of the surface improvements, resulting in a saving of $202.88, and the separate listing of the railroad spur, effecting a saving of $78.09."

Now, if the Court please, I offer in evidence, separately, the three lines following the last word just read into the record, on page 106, which, as I understand, is a matter that your Honor is in some doubt about at the present time. ("It is the sense of this Board that Mr. Dunlap is entitled to some compensation for the service rendered in these matters.")

The COURT.—I suppose the same objection will

be made, and the evidence will be excluded.

Mr. SUMMERFIELD.—I ask for the benefit of an exception to the ruling of the Court excluding those three lines, and assigning as the ground of my exception that the same constitutes a corporate expression of the defendant, acting through its proper authorities regularly met and assembled, and directly cognate to the main issue involved in this case, to wit, the liability of the Company, and the character of the services rendered by the plaintiff to the defendant Company.

I now offer in evidence, if the Court please, that portion of the minutes of the defendant Company of February 15th, 1910, consisting of lines 29, 30, 31 and 32, as contained on page 106 of the minutes. **[106]**

("Therefore be it resolved, that the Secretary-Treasurer of this Company be, and he hereby is, instructed to pay R. P. Dunlap the sum of $1000 out of the funds of this Company.")

Mr. THAYER.—Same objection.

The COURT.—The objection will be sustained.

Mr. SUMMERFIELD.—I desire the benefit of an exception, if the Court please, assigning as the ground of my exception that the same constitutes a corporate act of the defendant Company through its proper Board of Directors duly assembled, and upon a subject matter cognate and bearing upon the main issues involved in this case.

Now, if your Honor please, I have not made the formal offer, I understand your Honor has indicated your ruling upon it; but in order to have the record

correct, I now offer in evidence Exhibit No. 1, offered for identification, and on file with the Clerk of the court at the present time.

Same objection. Same ruling.

Mr. SUMMERFIELD.—I ask for the benefit of an exception to the exclusion from evidence of the document offered, assigning as the ground of my exception that it is material to the main issue in this case, and that it is directly connected with and explanatory of that portion of the minutes already admitted and read in evidence.

The COURT.—The exception may be entered, and you may call the next witness. **[107]**

[Testimony of James J. McQuillan, for Plaintiff.]

Mr. JAMES J. McQUILLAN, a witness called for plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. SUMMERFIELD.)

Q. What is your name?

A. James J. McQuillan.

Q. Where do you reside? A. Tonopah.

Q. How long have you lived there?

A. About ten years.

Q. Are you acquainted with Mr. Dunlap, the plaintiff in this case? A. Yes, sir.

Q. How long have you known Mr. Dunlap?

A. How long have I lived in this State?

Q. No, how long have you known Mr. Dunlap?

A. Oh, I presume about seven years.

Q. You know of the Montana-Tonopah Mining Company, the defendant in this case? A. Yes, sir.

(Testimony of James J. McQuillan.)

Q. How long have you known of that Company?

A. How long have I known of that Company?

Q. Of the Company, yes; how long have you known of the Company?

A. Well, since its organization.

Q. You were connected with the Company, were you not, in some capacity? A. Yes, sir.

Q. What was that capacity?

A. As a director in the Company.

Q. And between what times?

A. I am not positive, but I think it was from 1905 on till 1909, September, 1909.

Q. Do you know of your own knowledge, whether or not Mr. Dunlap, the plaintiff, was connected with the Company during the time that you have mentioned? A. Oh, yes, no question about that. **[108]**

Q. In what way was he connected with the Company? A. As Vice-President.

Q. In any other capacity during your directorship?

A. Not that I would know of, other than his activity in various matters pertaining to the Company affairs, as far as I know.

Mr. THAYER.—I move that answer be stricken, the latter portion of it, because it is not responsive.

The COURT.—I will allow that answer to stand.

Q. Were you a director of the Company during the time that Mr. Dunlap was Secretary and Treasurer?

A. No, I don't think so.

Q. What, if you know, Mr. McQuillan, did Mr.

(Testimony of James J. McQuillan.)

Dunlap do for that Company during the time that you were a director, what did you observe that he did? You have mentioned that he was actively interested in certain matters for the Company, now I wish you would designate what they were.

A. As to what he has done I can only say that I thought he took a very active part in matters pertaining—

Mr. THAYER.—I ask the privilege of stopping the witness, and move that part of the answer beginning with "I thought" be stricken.

The COURT.—I will allow that.

Q. What do you know of your own knowledge, Mr. McQuillan, about what Mr. Dunlap did for the Company during your directorship, I mean now the substance of what he did.

A. Well, I can't go into details as to those matters; but I say that I knew of him taking a very active part in all matters pertaining to the Company, as far as my knowledge goes; and also as a director of the Company in meetings that I was called to.

Q. Who called you?

A. Why, the annual meeting.

Q. Did you hold any office there in the county government during a portion of that time, Mr. McQuillan? A. I did. **[109]**

Q. What was it? A. In Nye county?

Q. Yes.

A. As one of the Board of County Commissioners.

Q. Do you have any recollection of Mr. Dunlap ap-

(Testimony of James J. McQuillan.)
pearing before you while the Board was in session?

A. I have, on two occasions.

Q. State what you know about that.

A. Well, in regard to the taxation; we, meeting as a Board of Equalization, Mr. Dunlap appeared both years that I was a member of that Board.

Q. What did he do before the Board?

A. Well, I have not got that in my head, but in one case, I understand, or at least, as near as I can recollect, he brought down the taxes in regard to the mill, which was only in operation three months.

Q. Did or did he not make any presentation and argument, or present before the Board anything in the nature of a showing why the Board should make reductions? A. He did.

Q. Now do you recall anything else that came under your observation that Mr. Dunlap did during your directorship for the Company?

A. I believe Mr. Dunlap appeared before the Board one time in regard to—

Mr. THAYER.—Just a moment. If Mr. McQuillan knows, he may state what occurred, not what he believes, it is hearsay, and we object to that.

A. Well, I know that. I know that Mr. Dunlap appeared before the Board in regard to a town fire tax for the town of Tonopah, and the Board would not allow it; he talked us to death.

Q. Do you know anything about any of those injuries, the settlement of them; injuries to different persons employed by the Company, do you know any-

(Testimony of James J. McQuillan.)

thing about that, Mr. McQuillan? **[110]**

A. I have never taken any part in that.

Q. Well, do you know whether or not Mr. Dunlap had anything to do with the adjustment of cases?

A. I presume he did, I don't know it.

Mr. THAYER.—I move that answer be stricken; he says he presumes so, but didn't know.

A. Well, no, I can't say.

Q. I ask you if you know whether he did or not?

A. No, I can't say.

The COURT.—Then it will be stricken out.

Q. Who was the President of the Company during the time? A. Charles E. Knox.

Q. Who, if you know, during your directorship, Mr. McQuillan, in the main, conducted the executive affairs and the field operations, so to speak, at Tonopah, where the mining property was situated?

Mr. THAYER.—Objected to for the reason it calls for a conclusion of the witness as to who directed the affairs of the corporation. The witness may recite what different people did with reference to the administration of the corporation, but he cannot give his conclusion as to who directed its affairs.

(Objection overruled. Defendants excepts.)

A. My impression is, or was—

The COURT.—You will have to state what your actual knowledge is.

A. I don't know.

Q. Your answer is that you don't know, Mr. McQuillan? A. I don't know.

(Testimony of James J. McQuillan.)

Q. Will you state to the Court and jury, so far as came under [111] your observation during that time, what Mr. Dunlap did with reference to the affairs of the Montana-Tonopah Company; what you saw him do, if anything, and what it was.

A. I have already stated, Mr. Summerfield, that he took an active part in regard to the taxation of the Montana-Tonopah, called meetings in his office, directors' meetings, which I have attended, and, of course I cannot give any impressions.

Mr. THAYER.—I would like to have the witness cautioned against making remarks of that sort.

The COURT.—I do not think there is any intention of improper conduct by the witness; it is simply an excuse for not going on further; he says he cannot give impressions, and that is true.

Q. Now at these meetings which you have spoken about, if I understand you, they were called by Mr. Dunlap, were they? A. As directors' meetings?

Q. Yes. A. Yes.

Q. Was there any executive action, that you remember of, taken at those meetings with reference to Mr. Dunlap doing anything for the Company, outside of that which pertained to his directorship?

A. Not that I remember of being—

Mr. THAYER.—Objected to for the reason it calls for a conclusion of the witness upon a question of law.

The COURT.—He can answer the question yes or no, and then his further answers will disclose whether

(Testimony of James J. McQuillan.)

it is a conclusion or not.

Q. Do you know whether there was or was not?

A. Yes.

Q. What were they, if you know?

Mr. THAYER.—The question is objected to for the reason it calls for a conclusion of the witness upon a question of law, and not for a statement of fact. **[112]**

The COURT.—You can ask what was done, ask for that.

Mr. SUMMERFIELD.—That is what I do desire to ask.

Q. What was done?

A. Holding the various meetings of the directors monthly, as called for by the by-laws, and formulating the by-laws; attending monthly meetings of the Board of Directors, of which Mr. Lynch, Mr. Dunlap and myself were named at an annual meeting; performed those duties.

Q. Who did perform the duties in the main?

A. Mr. Dunlap.

Q. Now, if I understood you correctly, you do not know anything about the settlement or adjustment of accident cases that happened in the mines?

A. Nothing whatever.

Q. Were you or were you not connected with the Company at the time its mining properties were patented? A. No.

Q. When was it that you commenced as a director, do you remember?

(Testimony of James J. McQuillan.)

A. I think it was in 1905, September of 1905.

Q. Were you or were you not present at any meeting of the Board of Directors, Mr. McQuillan, when the subject of Mr. Dunlap's compensation for services, other than his salary as Secretary and Treasurer, was considered? A. No, sir.

Q. You were not present? A. No, sir.

Cross-examination.

(By Mr. THAYER.)

Q. You and Mr. Dunlap and Mr. Lynch were on a committee for the preparation of by-laws, weren't you? A. Yes, sir.

Q. The committee extended over a period of years, did it not; the by-laws were not prepared, anyway, until some time after the committee was appointed?

A. We met in his office and talked the matter over.

[113]

Q. Can you answer the question?

The COURT.—Read the question.

(Question read by reporter.)

Q. The committee was appointed in August, 1906, was it not, and the by-laws were reported and adopted in September, 1907, just about a year?

A. I presume.

Q. The meetings held in Mr. Dunlap's office to which you have referred, were they meetings of this committee, or of the entire Board?

A. Well, as I say, we would meet in Mr. Dunlap's office, because we would get tired of walking up on the hill.

The COURT.—Q. Was this a meeting of the

(Testimony of James J. McQuillan.)

entire Board or just of the committee, was the question. A. The committee.

Q. At the time that the matter of the reduction of taxes came up before the Board of County Commissioners, the reduction was based upon the fact that the mill had only been in operation or completed for three months of the fiscal year, whereas it was assessed at its full valuation for the entire year, that is a fact, is it not, Mr. McQuillan? A. It is.

Q. And as soon as your attention and that of the other Commissioners was called to that fact, you immediately reduced the assessed valuation, didn't you? A. We did.

Q. Without any argument at all?

A. Well, it took some argument.

Q. Well, did it require any further argument than a plain statement of the fact, so as to show you that that is what had been done?

A. Well, things are hard to recollect, going back to 1907.

Q. Well, when did you forget about it?

A. Why did I forget about it? **[114]**

Q. When?

A. Well, brought to my attention, the minutes of the Board of County Commissioners will show for all those things.

Q. You told me, did you not, that the minutes of the Board of County Commissioners did not show that, at one time, who was present at all; didn't you tell me that? A. Yes.

Q. They don't show that?

(Testimony of James J. McQuillan.)

A. It shows about the reduction in the taxation of the Montana, and I understood you to ask me that question, not in regard to Mr. Dunlap doing anything in the matter of a lengthy argument.

Q. Well, did it take a great deal of persuasion by Mr. Dunlap to secure that reduction from the Commissioners?

Mr. SUMMERFIELD.—Object as calling for the opinion of the witness on a question of metaphysics and mental process.

The COURT.—Answer the question.

A. It certainly did.

Q. Didn't you tell me to-day noon, as soon as the attention of the Board of County Commissioners was called to it, that you voluntarily reduced it, and that another man was over there two or three times for the Montgomery-Shoshone?

A. That is what I wish to make a statement of right now.

The COURT.—Wait a minute.

Mr. SUMMERFIELD.—Object to the question propounded on the ground it is not in cross-examination of any evidence introduced in this case, but, upon the contrary, it is an attempt to elaborate a private conversation had at some place between the interrogator and the interrogated witness.

Mr. THAYER.—I think I am entitled to ask the question to show the bias of the witness.

The COURT.—You did not ask about that testimony, Mr. Summerfield, but if the witness has made contradictory statements at [115] other times, it

seems to me that he can be questioned about it. I will overrule the objection.

Mr. THAYER.—That is all.

Mr. SUMMERFIELD.—That is the plaintiff's case in chief.

Mr. THAYER.—At this time, if the Court please, I desire to interpose a motion for a nonsuit.

(Jury excused.)

[Motion for a Judgment of Nonsuit, etc.]

Mr. THAYER.—The defendant moves the Court at this time that the jury be instructed to find for the defendant, for the reason that the evidence submitted by the plaintiff does not sustain the plaintiff's complaint, and that the plaintiff is not entitled to recover from the defendant, for the reason that all of the services performed by the plaintiff, as shown by the testimony, were without consideration, were voluntary, gratuitous, and not by any agreement, express or implied, to be compensated for by the defendant; that during all of the time such services were rendered the plaintiff was an officer or a director of the corporation defendant; that such services were presumed to be rendered on behalf of the defendant by the plaintiff, gratuitously, and that the plaintiff has not adduced evidence to overthrow such presumption; that such services were rendered without consideration, and without any agreement for compensation, and were rendered under such circumstances that no agreement for compensation from the defendant to the plaintiff could be implied.

The defendant further moves the Court for a judg-

ment of nonsuit for the following reasons: That the evidence submitted by the plaintiff does not sustain the plaintiff's complaint, and that the plaintiff is not entitled to recover from the defendant, for the reason that all of the services performed by the plaintiff, **[115½]** as shown by the testimony, were without consideration, were voluntary, gratuitous, and not by any agreement, express or implied, to be compensated for by the defendant; that during all of the time such services were rendered the plaintiff was an officer or a director of the corporation defendant; that such services were presumed to be rendered on behalf of the defendant by the plaintiff, gratuitously, and that the plaintiff has not adduced evidence to overthrow such presumption; that such services were rendered without consideration, and without any agreement for compensation, and were rendered under such circumstances that no agreement for compensation from the defendant to the plaintiff could be implied.

The COURT.—I will make a *pro forma* ruling, overruling the motions.

To which rulings the defendant duly excepted, upon the grounds stated in the motion.

(Jury returned into court.)

[Testimony of W. B. Alexander, for Defendant.]

Mr. W. B. ALEXANDER, a witness called by defendant, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. THAYER.)

Q. You have testified upon previous interrogation,

(Testimony of W. B. Alexander.)

Mr. Alexander, that you were the Secretary and Treasurer of the Montana-Tonopah Mining Company, the defendant in this action?

A. Yes, sir, I am.

Q. How long have you occupied that position?

A. Since June 15th, 1906. [116]

Q. What other offices or connection with that Company have you held, or do you now hold?

A. I have been assistant manager of the Company.

Q. Give the dates, please.

A. That was between September, 1907, and March 15th, 1908, I was assistant manager of the Company, and on one occasion I was a director for a few months, and I am at the present time a director.

Q. When were you a director for a few months?

A. I think it was at the annual meeting of the stockholders in 1908, that I was elected a director, and served, if my recollection serves me correctly, until November, and I gave way to a Philadelphia man on the Board.

Q. When did you enter the employ of the Montana-Tonopah Mining Company, the defendant?

A. On February 1st, 1906.

Q. And in what capacity?

A. As bookkeeper.

Q. And how long did you serve in that capacity?

A. Until June 15th, 1906.

Q. What was your salary at the time or during the period you have just mentioned?

A. It was $150 a month when I first went to work for the Company and when I was elected Secretary

(Testimony of W. B. Alexander.)

and Treasurer it was raised to $200 a month, and it remained at $200 a month until August 31st, 1907, and from August 31st, or rather September 1st, 1907, until October 31st, 1909, it was $250 per month, and from November 1st, 1909, to date, $300 per month.

Q. Please relate to the Court and jury the duties which you have been performing and are now performing as Secretary and Treasurer of the Company and as a director of the Company.

Mr. SUMMERFIELD.—I object, if the Court please, unless it is first shown that there are no by-laws defining the duties; if **[117]** there are by-laws that would be the better evidence.

Mr. THAYER.—The by-laws prescribe certain specific duties, but the objection is not good as to interrogating a witness what duties he does perform in that office for any purpose whatever. The by-laws do not limit the duties of the Secretary and Treasurer, or of any other officer of the Company, but they define what duties he shall perform, and it may be shown by custom what duties are usually performed by that officer, your Honor; therefore, I think the objection is groundless.

The COURT.—This does not relate to the time when Mr. Dunlap rendered these services. Do you propose to show, or do you propose to prove that the custom and the law was precisely the same at that time as it is now?

Mr. THAYER.—I do, your Honor. We have a right to show by this witness, who occupies now the position, and who occupied it for a portion of the

(Testimony of W. B. Alexander.)

time for which the plaintiff is suing for services, exactly what services are usually performed as an incident to the office of Secretary and Treasurer of the Company.

The COURT.—It would seem to me if the by-laws define, and you admit they do, what the duties of Secretary and Treasurer are, that they should be introduced. You have not the by-laws?

Mr. THAYER.—I have a copy of the by-laws.

The COURT.—I am very doubtful about that method of proof, under the circumstances; you can show by the witness what he did, I will allow you to do that.

Mr. THAYER.—Then I will change the question.

Q. What have you done in the way of services for the benefit of the defendant Company, since June 15th, 1906?

A. I have kept the books of the Company, purchased all supplies, machinery of every nature; attended to all stock transfers; have **[118]** attended and had general supervision during part of the time of all surface work going on; and during the absence of Mr. Collins, superintendent, since his regime began, and during the absence of Mr. Knox, the president, have been the administrative head of the Company, attending to all matters and passing upon all matters of policy; all matters of business of every nature.

Q. Do you still perform those duties? A. I do.

Q. Did you perform those duties at all times, outside of the period which you have testified to, that

(Testimony of W. B. Alexander.)

you were assistant general manager of the Company?

A. Both prior and since.

Q. And during that period?

A. And during that period.

Q. Can you think of anything else that you have done in connection with your services for the Company?

A. Why, I have settled claims; I have attended to patenting ground for the Company; attended to the adjustment of differences between the railroad company and the Montana-Tonopah Mining Company, and between mining companies, neighboring mining companies and the Montana-Tonopah Mining Company, differences relating to tolls over the Montana spur.

Q. What have you done with reference to patenting claims, Mr. Alexander?

A. There is a patent in course of adjustment at the present time, where I am acting as the agent, or rather attorney-in-fact for the Company, in the obtaining of patent.

The COURT.—(Q.) Was that before or since Mr. Dunlap resigned his connection with the Company?

A. I think the application—the order of survey dates back something like, I believe, two years or more, but the real application for patent, that is, the advertising, did not take place until some time this spring; I am inclined to think it is since Mr. Dunlap resigned as a director and Vice-President. **[119]**

Mr. THAYER.—If your Honor please, all of these questions go to the custom of the office.

(Testimony of W. B. Alexander.)

The COURT.—I shall allow you to go on and prove that, but it occurs to me this way: Suppose this man is hired as Secretary and Treasurer of the Company, and voluntarily goes down the mine and swings a pick and shovel, does that make it then a part of the duties of the Secretary and Treasurer to swing a pick and shovel in a mine?

Mr. THAYER.—Not at all.

The COURT. (After argument.) I have allowed you to ask the question, and I shall allow you to go on and draw out all that you wish, but so far it is not admitted as the custom of the Company; it is simply what he did when he was Secretary and Treasurer.

Q. State whether or not during the year 1906 you did anything for the Company with reference to stock certificates which had been lost or destroyed?

A. Immediately following the San Francisco fire, we received, I believe I would be safe in saying a hundred or more applications for the restoration of lost stock, destroyed stock; and in some instances stock certificates were returned simply charred, they were black, you could make them out, and in other instances those certificates that had formerly been held were burned, and the owner made application to the Company for the reissue of new certificates. The Company authorized me to issue new certificates whenever the owner complied with—well, furnishing affidavit as to how stock had been lost, and furnishing an indemnifying bond to the Company in the sum of ten dollars for each share.

(Testimony of W. B. Alexander.)

Q. What did you do with reference to securing the bond, the form of the bond?

A. I called upon Mr. Hugh Brown, who was employed from time to **[120]** time by the Company in such matters, to prepare a form of indemnifying bond that could be used, elastic enough so that it could be used to apply to almost any case of that nature that might come up; and he did so prepare a bond, from which I, myself, prepared all of the bonds that were issued, or rather, sent to the owners of the lost stock, and they in turn executed them, and returned them to the Company, and when properly executed, I reissued their stock to them.

Q. State to the Court and jury what, if any, conversations you had, or what you did with the plaintiff in this case with reference to the bonds?

A. Why, I had numerous talks with Mr. Dunlap; he was a director of the Company and Vice-President of the Company, and as such, I discussed matters with him; he was living on the hill, and frequently there would be days at a time, at noontime particularly, he would come in the office and ask if there was anything new, and when there was, I would always discuss it with him, in deference to him as a director and Vice-President of the Company.

Q. Was Mr. Dunlap signing stock certificates at this time?

A. Yes, sir, at times; Mr. Knox was also.

Q. Do you recall any conversations that you ever had with Mr. Dunlap, or with anyone, with reference to the settlement of claims for personal injuries, of

(Testimony of W. B. Alexander.)

Ursin and Smeigh?

A. Why, that matter was discussed; I talked the matter over with Mr. Collins, the superintendent; I talked it with Mr. Knox; and I dare say I talked it with Mr. Dunlap, as it was purely a family matter, a matter that concerned the Montana.

Q. Did you have anything to do with the settlement of that case?

A. Only in its payment, the payment of the amounts.

Q. You drew the check? **[121]**

A. The checks and vouchers covering the payment of the claims.

Q. Do you know what you did with them?

A. In what particular?

Q. What you did with the checks and vouchers; how you disposed of them, to whom you gave them?

A. I think that both Ursin and Smeigh came to the office and receipted for them on the voucher, and were given the checks right in the office, that is my recollection.

Q. Do you know of another accident that occurred about that time to which no reference has been made in the plaintiff's case, just prior to the Smeigh and Ursin accidents?

A. Why, I think a man had an ankle broken; at times those accidents come along pretty thick; we had a man by the name of Tony Bosso, and my recollection is that was prior to the Smeigh and Ursin accident, although I am not sure.

Q. Do you know anything about the settlement of

(Testimony of W. B. Alexander.)

that claim? A. Of the Tony Bosso?

Q. Yes. A. Yes, sir.

Q. Relate to the Court and jury what took place, and what you did with reference to the settlement of that claim?

A. Why, the settlement was made, if my memory serves me correctly, by Mr. Collins and myself with Bosso, and we paid him right in the office, settled the claim, and he went away to California, I think to recover, and came back finally and was given a job and is still working at the mine.

Q. Did Mr. Dunlap have anything to do with that settlement? A. Not that I know of.

Q. What, if anything, do you know of the Merton accident?

A. I know nothing of it; I was not at the mine at the time that **[122]** took place; I think I was away on a vacation in San Francisco, and on my return Mr. Collins told me all of the circumstances connected with it, but I know nothing of my own knowledge, I was not there.

Q. What do you know, if anything, with reference to questions which came up in the transfer of stock in your office with this Company, which were endorsed by deceased persons?

A. Why, that is something that occurred very often; where stock is owned by a person and they die, administrators are appointed, and they oftentimes will write in, asking that stock be transferred to them, without furnishing copies of the letters testamentary, or something to that effect, to show us

(Testimony of W. B. Alexander.)

that they have the authority to have it so transferred; and that is a matter I have discussed with Mr. Dunlap frequently, whenever he happened to be there in the office; sometimes I called him up over the phone, and asked his opinion with regard to it.

Q. Did you discuss with the attorney of the Company any of these matters?

A. At times, yes, sir, not very often, though.

Q. Who was the attorney of the Company?

A. Why, we had Mr. Hugh Brown, whom we called upon at any time when it was necessary to have legal advice.

Q. Did the Company pay Mr. Brown or his firm an annual retainer? A. No, sir.

Q. Paid them for services as rendered?

A. Services as rendered.

Q. Do you know whether or not Mr. Brown was paid for the preparation of the indemnity bond, and for his advice on this question of stock endorsed by representatives of deceased persons?

A. Yes, sir, he was.

Q. State what you know with reference to the tax questions which were under consideration in the fall of 1907. **[123]**

A. During the spring, when the Assessor came around looking over the property, I went over the entire surface plant with him, and called his attention to the fact that the assessment that had formerly been on the property was high, that it should be reduced; and he said that he would make out a schedule covering that point, but I don't think there

(Testimony of W. B. Alexander.)

was anything said about the mill; that was purely relating to the surface improvements; and I know that we ran over some, attempting to fix what might be considered a fair valuation on the buildings and improvements as they existed.

Q. What do you know, if anything, with reference to the reduction of taxes, and what action was taken by the Board of County Commissioners on account of the mill not being completed at the time of the levy, or during the period of the levy?

A. I know that the amount of taxes was reduced; that is, the amount that the Company paid was less than the amount that was placed on the schedule.

Q. Do you remember whether or not that was ever discussed in any meeting of the Board of Directors?

A. It was.

Q. Relate the circumstances.

A. I cannot recall the meeting, but it was a meeting at which Mr. Knox, Mr. Dunlap, and whether or not Mr. Lynch and Mr. McQuillan were present at that time, I am not sure, and myself were present, and a discussion regarding the taxes was gone into very thoroughly, and it was decided to take some action looking toward the reduction—

Mr. SUMMERFIELD.—Wait a minute. If your Honor please, I object to testimony of what was decided upon, if it was at a Board meeting, the minutes of the Board are the best evidence in that respect.

Q. Just state what was said and done, Mr. Alexander. **[124]**

Mr. SUMMERFIELD.—I object to what was said

(Testimony of W. B. Alexander.)

and done by the directors in speaking with each other; that the minutes of what the Board, as a Board, did are the best evidence.

Q. Mr. Alexander, do you prepare the minutes of each meeting of the Board of Directors, and have you done so since you have been Secretary of the Company? A. I have.

Q. State whether or not the minutes fully set forth all of the transactions had at each meeting of the Board. A. Everything of importance.

Q. State whether or not there is anything in any of the minutes of the meetings in September or October, 1907, relating to the matter of taxation.

A. May I ask what date?

Q. September or October of 1907, it was testified to.

A. (After examining minutes.) I find nothing here during those months, sir, that refers to anything in regard to that.

Q. Do the minutes contain anything relating to the matter of equalization of taxes of the Company for that year?

A. Well, that I could only tell by going both before and after those dates.

Q. Well, I think it will be necessary to do so.

The COURT.—Can you proceed with some other part of the examination, and let him look over the records during recess?

Mr. THAYER.—Yes, sir.

Q. What was the custom of the corporation with reference to settlement for claims for damages dur-

(Testimony of W. B. Alexander.)

ing the period of your connection with the Company as Secretary and Treasurer?

A. The custom was always very liberal, liberal with their employees; it was not a question so much of whether the Company carried employers' liability insurance, as it was the connection of the **[125]** employee with the Company; more in the nature of a moral obligation rather than legal.

Q. Do you know what was done in connection with the settlement of the Swope accident? A. I do.

Q. Relate that, please.

A. Pertaining particularly to the settlement?

Q. Yes.

A. Why, I had, I would not begin to tell you how many conversations with Mr. Swope, many of them alone, some with Mr. Dunlap, where we both talked with him; he was inclined to be, as we thought, unreasonable; he wanted some recompense, but would not state what he considered fair; in fact, you could not get any statement from him at all as to what he considered fair; and, as a matter of fact, the thing ran along to a point where we had almost given up in despair, and Mr. Knox finally made an adjustment of that claim by agreeing that the Company would pay Doctor Hammond's bill of five hundred dollars for the amputation of the arm.

Q. What did you do?

A. I received instructions from Mr. Knox to pay that five hundred dollars, but prior to receiving that, I had had a conference with Doctor Hammond regarding his claim, and he reduced it; my recollection

(Testimony of W. B. Alexander.)

is that he reduced it to $375, and when I received the instructions from Mr. Knox to pay that bill, which was by letter, to a Mr. Paxton of Kansas City, I think that was the name of the lawyer, I immediately took up with him the question of Doctor Hammond being willing to accept $375, and I did not want to pay the additional $125, and we had quite a lengthy lot of correspondence regarding it; but finally Mr. Knox, I think, when he returned to Tonopah, instructed me to pay the $125 additional to Mr. Paxton, on behalf of Mr. Swope. **[126]**

Q. Do you know anything about the settlement of any of the other cases which have been referred to by the plaintiff in his testimony, which you have not been interrogated about by me? Do you know anything about the settlement of the Mitchell case?

A. No, sir; that was before my connection with the Company.

Q. How often did you consult with the plaintiff when you were discharging your duties as Secretary and Treasurer of the Company?

A. Well, I can't consider it in the nature of consulting; whenever any questions, any new questions, arose, any questions pertaining to the general run of business, and Mr. Dunlap was around, I always discussed it with him freely.

Q. Did you discuss matters with other directors of the Company? A. Yes, sir.

Q. In the same way that you did with Mr. Dunlap?

A. Yes, sir.

Q. As often?

(Testimony of W. B. Alexander.)

A. No, because they were not around as often.

Q. Where did Mr. Dunlap live?

A. At the mine.

Q. And where did the other directors who resided in Tonopah live?

A. Well, across town; we were on one hill, and there was a gulch and the main part of the town was on the opposite side.

Q. Why did you discuss matters with Mr. Dunlap especially?

A. Simply because he was a director and Vice-President, and the affairs of the Company that concerned him as an officer of the Company; in deference to him.

Q. Did you discuss matters with other officers?

A. I discussed them with Mr. Knox, and have always discussed them with the various managers and superintendents we have had since I have been connected with the Company.

Q. Matters of general policy of the Company?

A. Yes, sir. **[127]**

Cross-examination.

(By Mr. SUMMERFIELD.)

Q. Had you lived at Tonopah previous to entering the employment of the defendant company, Mr. Alexander?

A. I had not lived there, no, sir, I had just passed through.

Q. Where were you living previous to that time?

A. Where?

Q. Yes.

(Testimony of W. B. Alexander.)

A. I had lived at Goldfield and had lived at San Francisco, and Lida.

Q. You were not so situated previous to the time of your entering the employment of the Company that you had any personal knowledge of what Mr. Dunlap did do for that Company?

A. No, sir, none whatever.

Q. And you entered the employment of the Company in 1906? A. February 1st, 1906.

Q. Did you succeed Mr. Dunlap?

A. No, sir, I succeeded Edgar C. Knox.

Q. Had you previously been acquainted with Mr. Dunlap? A. Not until I went to Tonopah.

Q. Was Mr. Dunlap a director of the Company at the time that you became its Secretary?

A. Yes, sir.

Q. Did you become the Treasurer, also, at the same time you became Secretary?

A. The same time that I was elected Secretary, the two offices are held by one person.

Q. It is a consolidated office, is it not, Secretary and Treasurer? A. Yes, sir.

Q. You say that Mr. Dunlap was a director at that time? A. He was.

Q. And was he also Vice-President at the time?

A. Yes, I feel quite sure about that; let's see, 1906, yes, he was Vice-President at that time. [128]

Q. And Mr. Knox, who is present in the court-room, was President of the Company at the time, was he? A. Yes, sir.

Q. And where was Mr. Knox from the time that

(Testimony of W. B. Alexander.)

you became Secretary-Treasurer of the Company until 1910? A. Where was he?

Q. Yes.

A. Why, he was at Tonopah part of the time; he was in Berkeley part of the time, and Philadelphia part of the time.

Q. About what proportion of the time during that period was he at Tonopah?

A. That would be a very difficult matter; he would come in at times and stay there, oh, sometimes, merely a day; and other times he would be there for a week or ten days.

Q. Would it accord with your observation, Mr. Alexander, that Mr. Knox was there a fourth of the time during the period?

A. Well, that would be awfully hard to estimate, because, as a matter of fact, he would frequently come in there and go out again, and come back again, and I never attempted to fasten any estimate of the length of time that he was there.

Q. And by reason of that fact, and never paying any particular attention to it, it would be difficult at this time for you to say what proportion of the time he was there?

A. It would be very difficult for me to make any kind of an estimate I would consider worth anything.

Q. As a matter of fact, Mr. Alexander, he was absent a great deal of the time in the East and in San Francisco, was he not?

A. He was a portion of the time, yes, sir.

(Testimony of W. B. Alexander.)

Q. Now, during the absence of Mr. Knox, who was the executive head of the Company there in directing its affairs, and looking after its interests?

A. During what period, sir?

Q. During the times that Mr. Knox would be absent from Tonopah, and while you were Secretary-Treasurer of the Company?

A. Well, I was the executive head during a great portion of the [129] time.

Q. What did Mr. Dunlap have to do with directing the affairs of that Company during that time, during the absence of Mr. Knox? A. Nothing.

Q. Nothing whatever? A. No, sir.

Q. You frequently called him in consultation, did you not?

A. As to the affairs of the Company, certainly, sir, talked them over with him.

Q. And you simply called upon him as a director?

A. As a director and Vice-President of the Company.

Q. As Vice-President? A. Yes, sir.

Q. Is it not true, Mr. Alexander, that during that time Mr. Dunlap, in Mr. Knox's absence, performed the duties of the President of that Company?

A. Why, he did in so far as the President's duties of signing stock certificates, and if it were necessary to call a directors' meeting during Mr. Knox's absence, Mr. Dunlap would do it, but not in the management of the property.

Q. Is it or is it not true, that outside of those duties, such as calling meetings and presiding at

(Testimony of W. B. Alexander.)

meetings, and signing certificates, and actions of that kind and character, that Mr. Dunlap was very frequently engaged in negotiating business affairs of the Company, and in adjusting its business matters outside?

A. No, sir, it was very, very rare when anything of that kind occurred, if at all.

Q. You did most of that yourself, did you?

A. I did.

Q. Do you recall any other directors of that Company whom you consulted with like you did with Mr. Dunlap, about its affairs?

A. No, because there were no other directors that were around [130] like Mr. Dunlap; he was there on the hill practically every day, and it would run for days at a time that Mr. Dunlap would drop in the office at noon, and want to know how things were going, and we would discuss what things had come up during that day, I would discuss it with him, tell him what had come up new.

Q. If I understand you correctly, he was about the only one there besides yourself to look after all those matters, wasn't he?

A. Well, I did not consider that there was anything for him to look after; I was employed for that purpose; I felt I was competent to carry it on.

Q. What were you employed for, besides performing the duties of Secretary-Treasurer, Mr. Alexander, now what else?

A. What was I employed for?

(Testimony of W. B. Alexander.)

Q. Yes, besides the duties of that consolidated office?

A. To look after the interests of the Company in every particular, which I endeavored to do.

Q. You say that your salary when you first went there, in February, 1906, until June, was $150 a month, is that correct? A. Yes, sir.

Q. Then afterwards, for a few months, it was raised to $200 a month?

A. I can give you those dates. (Consults memorandum.) June 15th, 1906, to August 31st, 1907, it was $200 per month; prior to that time, from February 1st, 1906, to June 15th, 1906, it was $150 per month; from September 1st, 1907, to October 31st, 1909, it was $250 per month; from November 1st, 1909, to date, $300 per month.

Q. You kept the books of the Company?

A. I did during the time I was bookkeeper, and often, in fact always, when the bookkeeper would go on a vacation, I carried them on, and have always directed all entries pertaining to the books [131] of the Company.

Q. Since your employment, you had a bookkeeper?

A. Yes, part of the time, I did not at first.

Q. When did you commence having a bookkeeper?

A. Why, I think it was in the fall of 1906; I think at the time we began to make our purchases for mill construction; I did all of the purchasing for mill construction.

Q. Now, previous to that time, the Secretary-Treasurer had done the work of that office, and kept

(Testimony of W. B. Alexander.)
the books both, had he not?

A. Not that I understand; I have seen vouchers of record where there was a bookkeeper in the office.

Q. When you first went in you did not have a bookkeeper, did you?

A. I supplanted, or rather, I succeeded the bookkeeper there.

Q. I mean when you first went in as Secretary-Treasurer, did you have a bookkeeper?

A. No, sir, I did my own bookkeeping; I had been bookkeeper prior to my election as Secretary-Treasurer, and when I became Secretary-Treasurer I also became bookkeeper, or continued as bookkeeper.

Q. You were not bookkeeper during any of the time that Mr. Dunlap was Secretary-Treasurer?

A. No, sir, I was not there at that time.

Q. Now, how long was it after you became Secretary-Treasurer until you had a bookkeeper also?

A. I think I received relief in the fall when our carloads of material began to arrive there; I was simply swamped, and I think it was during the fall that I received help first, temporarily, for two or three months, to give us a chance to catch up.

Q. That was in the fall of 1906 or 1907?

A. No, I think it was in 1906; no, it would not be in the fall, either, because, as a matter of fact, materials did not begin to **[132]** arrive until after the first of the year; the first of the year, 1907, so it would be along in the spring and summer when the big work was going on.

Q. Well, of 1907? A. Of 1907, yes, sir.

(Testimony of W. B. Alexander.)

Q. You say first it was temporary?

A. Yes, sir.

Q. And then permanently?

A. And permanently afterwards, yes; but there was a break in between, merely had office help; there was a young boy there that had grown up with the Company.

Q. And he is with you yet, is he?

A. He is with us, in our employment, but not in the same capacity.

Q. Do you know what salary he is paid?

A. At the present time he is paid $125 per month.

Q. Did you have any other help after you entered the employment of the Company which your predecessors did not have?

A. No, sir, we ran the office continually since then with the bookkeeper and the stenographer and myself; with the exception of less than a month I had a railroad man in there in going over old railroad claims, in order to make a claim against the railroad company; he was a regular railroad man, a rate man; I had him there less than a month; I think we paid him something like sixty odd dollars, from which we have collected somewhere close to two thousand dollars in railroad claims.

Q. When did you get a stenographer?

A. When?

Q. Yes.

A. Why, this young man that I speak of that had been there and had grown up with the Company, was our stenographer afterwards.

(Testimony of W. B. Alexander.)

Q. He is not only a bookkeeper, but a stenographer also?

A. Yes; I was trying to teach him to become a bookkeeper while I was Secretary, while I was doing my own work, and he helped in **[133]** many ways, and became very proficient.

Q. What is the salary of the stenographer, do you know? A. $125.

Q. And the bookkeeper $125?

A. And the bookkeeper $150.

Q. And yours $300? A. $300, yes, sir.

Q. You say that you purchased the supplies, was there anything more to that except simply ordering the machinery?

A. Well, there was all of the supplies incident to running a mine, timber and everything of that nature.

Q. Did you have anything to do with installing the machinery, or anything of that character, outside of the office?

A. No, sir, that was done by men employed for that purpose.

Q. You spoke about exercising a general supervision of all of the affairs of the Company, did you ever supervise the installation of any of the machinery, or its operation?

A. Not in the sense of installing it, no, sir; but was consulted by each of the heads of the different departments regarding their work.

Q. Would you call upon Mr. Dunlap in that respect as you proceeded? A. No, sir, I did not.

Q. Do you know whether or not he had anything

(Testimony of W. B. Alexander.)

to do with that kind and character of work for the Company? A. At the time that he was employed?

Q. No, during the time that you were employed?

A. Why, not that I know of.

Q. You don't know? A. Never heard of it.

Q. Now, with reference to making these stock transfers, that was office work, was it, in the office?

A. Surely, yes, sir.

Q. What did it consist of, except simply making the entries on the books? **[134]**

A. Why, it consisted in cancelling the old certificate that was turned in for a reissue into a new certificate, scrutinizing the endorsements to know whether they were perfectly proper and right, and issuing a new certificate, which not only required the signature of myself as Secretary and Treasurer, but also required the signature of the President or Vice-President, and in using the further protection of a dupligraph to punch and ink at the same time the number of shares that were covered by the certificate; the same as a check is protected.

Q. It was all purely office work?

A. Office work; yes, sir.

Q. And no one else had charge of the books except the Secretary of the Company? A. No, sir.

Q. And he was the officer to make those transfers?

A. He was.

Q. If I understood you correctly, you say you supervised the settlement of the Swope matter; now what nature of supervision did you give to that, Mr. Alexander? A. Supervision?

(Testimony of W. B. Alexander.)

Q. Yes.

A. Why, only in so far as trying to get Mr. Swope to state what he considered a fair recompense, which we were unable to obtain from him, and such statement.

Q. Do you know whether or not Mr. Dunlap actively exerted himself in negotiating for a settlement of that claim?

A. Why, he did at several times when he was with me.

Q. And do you know whether he did or not at times when you were not with him?

A. No, sir, I only know that at the time he talked with Mr. Swope when I was present, his efforts were just as fruitless as mine.

Q. Your remembrance is that that case was settled by Mr. Knox?

A. Yes, sir, that is my recollection of the entire case; he settled [135] it back at Independence, the Swope matter, or Kansas City, wherever it was that he met Mr. Paxton.

Q. Now, what fastens that in your mind, Mr. Alexander, as having been settled by Mr. Knox in Independence, Missouri, or Kansas City, or wherever it was in the East?

A. Why, one circumstance, in particular, was that when Mr. Knox returned from the East and instructed me to pay the additional $125 on that claim, he made the remark to me that I had gotten a very bad reputation with Mr. Paxton, and I asked him in what way, and he said that Mr. Paxton asked what

(Testimony of W. B. Alexander.)

kind of a fellow that Alexander was that they had at Tonopah; and Mr. Knox wanted to know why; well, he said, he is very technical, and then explained to Mr. Knox the correspondence that had passed between us, where I was living up strictly to the letter of my instructions to pay the Swope claim for the amount of Doctor Hammond's bill, which had been reduced to $375, and I could not see my way clear to pay $500, when the doctor had agreed to accept $375; and I was standing on that basis, that that was purely and the only authority I had, was to pay Dr. Hammond the amount of Doctor Hammond's bill; and, on the other hand, Mr. Paxton wanted the $500, and I could not see it that way, so from that fact he thought that I was rather technical; consequently that fastened itself in my mind very well.

Q. Mr. Paxton was the claimant's attorney?

A. Yes, sir; Mr. Swope's attorney.

Q. And he did not agree with you about the proper course of procedure?

A. No, he thought I was pretty mean to hold out that $125, and I thought I was only within my authority.

Court adjourned until 10 o'clock, September 23d, 1910. **[136]**

Friday, September 23d, 1910, 10 A. M.

Court convened.

Cross-examination of Mr. W. B. ALEXANDER (Resumed).

Q. Mr. Alexander, if you remember a portion of your testimony in chief correctly, you testified that

(Testimony of W. B. Alexander.)
while you were Secretary and Treasurer of the defendant Company that you bought all the machinery for the Company? A. Yes, sir.

Q. Do you remember, or were you acquainted with Mr. Boski? A. Very well.

Q. He was connected with the Company during that time, was he not?

A. He was the constructing engineer, I guess you would call him, for the mill.

Q. He prepared the plans and specifications for the installation of the machinery, and what machinery was needed, did he not? A. He did.

Q. That machinery was bought from a Milwaukee firm, was it not? A. Allis-Chalmers.

Q. Is it not true, Mr. Alexander, that Mr. Boski went to Milwaukee himself for the Company, and selected and negotiated and arranged for the purchase of that machinery?

A. Well, he may have selected, but he had no authority whatever to buy.

Q. When you say you bought it, what do you include in the term that you bought it? You did not select it, did you?

A. No, I had nothing to do with the selection of the machinery.

Q. Mr. Boski went to Milwaukee and selected it, did he not?

A. The machinery was in most, I think I can say in every instance, in the nature of a contract by specification, acted upon at the office of the Company, and ordered from the office of the Company.

(Testimony of W. B. Alexander.)

Q. And Mr. Boski prepared the specifications, didn't he? **[137]** A. He did.

Q. And the only thing that was done from the office of the Company was simply to fill out an order for the machinery; now, is not that true?

A. Yes, I think that merely the order went in from the office.

Q. And when you say you purchased it, the extent of the work that you did in that connection was simply, after specifications had been prepared, the machinery designated, and after Mr. Boski had gone to Milwaukee, interviewed the company selling the machinery, and selected it, that you filled out an order and sent it from there; now, is not that correct?

A. Why, certainly.

Q. Is there anything more that you did about that, merely than a Secretary of the Company, to make the order after knowing what it was, and just to transmit it from the office?

A. Paying the bills afterwards, yes, sir.

Q. Well, was there anything about paying the bills, except what was the duty of the Secretary to do that?

A. No, sir; and I did not consider it was any different.

Q. You kept the books?

A. I did part of the time.

Q. Didn't you have a bookkeeper nearly all the time for that purpose?

A. Part of the time, yes, sir.

Q. You say that you attended to the correspond-

(Testimony of W. B. Alexander.)

ence? A. I did.

Q. Didn't you have a stenographer and a clerk for that purpose? A. Only part of the time.

Q. For only part of the time? A. Yes.

Q. Do you know, Mr. Alexander, whether or not during the time that Mr. Dunlap held the office of Secretary and Treasurer there, he had a bookkeeper or a stenographer, or clerk, either one?

A. Only in so far as the records show, that he had help in the **[138]** office; I don't know it of my own knowledge.

Q. You don't know it? A. No.

Q. You do think that the records indicate that he did have some help in the office? A. Yes.

Q. I believe you have already testified you were not there during the time that he held that position?

A. No, sir; I was not.

Q. And consequently you could not have personal knowledge of it? A. No, sir.

Q. You were present at meetings of the Board of Directors, you were generally present, were you not, Mr. Alexander?

A. Yes, sir; not at every one, but generally I was.

Q. Generally you were? A. Yes, sir.

Q. Acting both as a director and as Secretary?

A. Well, part of the time not as a director; but at other times both as director and secretary.

Q. I will ask you to state, if you know, Mr. Alexander, whether it was not understood by the directors, and by yourself, as an officer of that Company, at the meetings that were held, that Mr. Dunlap should

(Testimony of W. B. Alexander.)

be compensated for the services for which he claims pay in this action? A. Most positively, no.

Q. It was not? A. It was not.

Q. And was it understood that they were gratuitous and a gift to the Company? A. Yes, sir.

Q. Was Mr. Dunlap a stockholder in the Company? A. Of record, yes, sir.

Q. He was of record?

A. That is the only knowledge I have.

Q. Now, is it not true that he was merely a stockholder in a very small amount of stock, and only for the purpose of filling the Board of Directors there?

[139]

A. No, the record would show to the contrary.

Q. How much stock did he have, if you know?

Mr. THAYER.—We object to that line of interrogation; it is not important to the issues of this case; it has not been raised on direct examination as to who any of the stockholders were; the plaintiff has not testified that he was a stockholder, and this witness has not testified to it, and for the further reason, that the books of the Company are the only evidence.

The COURT.—I do not believe that is material, whether he owns a large block of stock or a small block of stock, does not affect his right to compensation.

Q. Now, Mr. Alexander, you say that it was not understood by the directors to your knowledge, at least from anything that was said or done at the meetings, or from any officer of the Company, that Mr. Dunlap should be compensated for these services?

(Testimony of W. B. Alexander.)

A. It was not my understanding; no, sir.

Q. You were present at the meeting of February 15th, 1910, were you not? A. I was, yes, sir.

Q. You prepared the minutes of that meeting?

A. I did.

Q. Which have been exhibited to you, and which you have identified? A. Yes, sir.

Q. Was or was not the portion of those minutes which I read into the record in evidence in this case, the result of a consultation there by the directors, while assembled at that meeting? A. They were.

Q. And you correctly reported the result of that consultation of the directors while in session at that time, and while considering the very subject matter of Mr. Dunlap's claims against the Company?

A. Yes, sir. **[140]**

Q. And Mr. Dunlap had at that time presented, had he not, to the directors there a claim for compensation for the services embraced in this suit?

A. Yes, sir.

Mr. THAYER.—May it please the Court, I understand that counsel is making this witness his own witness on these interrogatories, because they are not cross-examination.

Mr. SUMMERFIELD.—I submit, if the Court please, that they are in cross-examination; that the witness was examined in chief about the holding of that particular meeting.

Mr. THAYER.—There was not a word said about it, I studiously avoided it.

The COURT.—I cannot say whether it was

(Testimony of W. B. Alexander.)

brought up at that time or not; however, it is immaterial, you may make him your own witness, if you wish to.

Mr. SUMMERFIELD.—I do not care to be understood as making him my own witness at the present time, while conducting the cross-examination. I will state very briefly, your Honor, that I do not claim the witness was interrogated about what took place at that meeting, but he was asked about the meeting being held at that time.

Mr. THAYER.—I am very positive he was not; it was not my intention to do so, and if I did it was an oversight.

Q. Now, you testified with reference to signing certificates of stock, you signed them as secretary, did you not? A. I did, yes, sir.

Q. And, of course, that was necessary at all times, that stock certificates should be signed?

A. That was part of my duties.

The COURT.—Did this witness testify in chief that there was no understanding about the payment?

[141]

Mr. SUMMERFIELD.—He did, he testified very emphatically.

Mr. THAYER.—Not in chief; but I do not care, there is no objection to the question.

Q. You testified with reference to making out certificates, were they made out by you, Mr. Alexander, or by the bookkeeper? A. Mostly by myself.

Q. But partly by the bookkeeper?

A. Yes, just a short time ago, it was somewhat

changed to relieve me.

Q. The correspondence was attended to in particular, if I understand you correctly, by yourself and partly by the stenographer?

A. Yes, until within possibly the past year I think I did most of the typewriting myself.

Q. Now, since the time that you have been Secretary and Treasurer, if I understand you correctly, you have not had any understanding or any conversation, or any talk with Mr. Dunlap about the subject matter of this suit at all?

A. Why, yes; there was once, I think it was during the summer prior to the time that he made his claim, he spoke to me about it.

Q. Where was that?

A. Near the mine; I was coming up the hill and he was going down, and he spoke to me about feeling that he ought to have recompense.

Q. Was anything further said about it?

A. Well, do you wish the conversation?

Q. Yes.

A. Why, he said that he thought he was entitled to recompense, and that he was going to ask for it, and I told him that the Montana-Tonopah had always been ready and willing to pay all of its just debts, and by all means, if he thought he had a claim, he should ask for it. **[142]**

Q. And that was about as far as you expressed yourself, was it? A. Yes, sir.

Q. You did not state anything with reference to any knowledge that you had, or what the claim

(Testimony of W. B. Alexander.)

would be based upon?

A. Absolutely none; I had no knowledge.

Q. Or whether it was meritorious or without merit, or anything at all of that kind? A. No, sir.

Q. You testified something with reference to the collection of railroad tolls there upon that portion of the track owned by the defendant Company; I wish you would explain that a little more fully, Mr. Alexander?

A. At the time the spur was built, a contract was entered into by the Company with the railroad company for the collection of one dollar per car for all loaded cars passing over the spur, which revenue would go to the Montana-Tonopah Mining Company; and something like a year later, the road was broad-gauged; in the first instance, it was a narrow-gauge road, and a year later it was broad-gauged; and the cars then passing over that spur were for the most part double the tonnage, possibly three times the tonnage that was originally intended in the contract; and it was for years, in fact, since 1905, I think, in a friendly way, attempted to have the contract changed, but without results; and my connection with that was in thrashing it out with the railroad people, in attempting to have the compensation fixed at a higher rate than a dollar per car.

Q. Was it in the line of having it fixed upon the tonnage, rather than by car numbers?

A. Yes, there was a claim made for it on the basis of six and a third cents a ton. **[143]**

Q. Now, where were those negotiations held, at

(Testimony of W. B. Alexander.)

Tonopah or elsewhere?

A. Well, as far as the negotiations I held, they were all at Tonopah.

Q. Who participated in them?

A. Mr. Hanlin, the superintendent of the railroad, he was the principal one.

Q. I mean as far as the defendant Company, the Montana-Tonopah Company was concerned?

A. Well, in those negotiations, I alone.

Q. Did Mr. Dunlap participate in them at all?

A. Merely at the discussions; some of them formal and some informal; some before the Board, and some just merely as we would meet and discuss them.

Q. Is it not true that he did a great deal of work about that in figuring out what would be an equitable adjustment, and one under which the Montana-Tonopah Company would obtain what it claimed it was entitled to?

A. No, sir; only just in the discussions, having his own views regarding it.

Q. Mr. Knox participated in it?

A. Mr. Knox was the one who made the settlement.

Q. Is it not true that Mr. Knox, Mr. Dunlap and yourself had frequent consultations, and figured and planned and negotiated, and prepared your argument so to speak, for the consideration of the using companies?

A. Mr. Dunlap may have figured; he is very good at figuring; but so far as any negotiations were concerned, he had nothing to do with it.

(Testimony of W. B. Alexander.)

Q. Were these held at the railroad company's office, while they were going on?

A. You mean these negotiations? **[144]**

Q. Yes.

A. Some of them were held, particularly, in fact the formal ones, were held at the Company office.

Q. I would ask if Mr. Dunlap participated in those meetings?

A. In the formal discussions, I think in almost every instance they were on the hill there, sometimes in the office, sometimes at the club-house at the mine.

Q. Where was the final settlement of the toll-rate charge matter made, at Tonopah or Philadelphia?

A. In the private car of Mr. Cutter, president of the Tonopah & Goldfield Railroad Company, at the depot in Tonopah.

Q. Was there a final consultation at the railroad office between the railroad officials and Mr. Knox, Mr. Dunlap and yourself? A. No, sir.

Q. Where was it?

A. Mr. Dunlap was not at any final consultation.

Q. At all? A. No, sir.

Q. Mr. Alexander, speaking generally now, was it or was it not your understanding as an officer of the defendant Company, and as a director thereof, that Mr. Dunlap should be compensated for the services for which he is suing? A. It was not.

Redirect Examination.

Mr. THAYER.—I ask that this paper be marked for identification.

(Marked "For identification, Defts. Ex. B.")

(Testimony of W. B. Alexander.)

Q. Mr. Alexander, you are handed a document, marked for identification Defendant's Exhibit "B," will you state what it is?

A. That is what was designated by myself as Mr. Dunlap's brief, presented at the meeting of the 15th of February, 1910, incorporating the claims— **[145]**

Mr. SUMMERFIELD.—I object to a statement of the contents. I understood the question was merely to designate the document.

Mr. THAYER.—That is right; stop right there, Mr. Alexander.

Q. Is that the paper which was handed in by Mr. Dunlap? A. It is.

Mr. THAYER.—We offer this in evidence, your Honor.

Mr. SUMMERFIELD.— There is no objection to its admission.

(Admitted and marked Defendant's Exhibit "B.")

Q. This was presented by the plaintiff to the meeting of the directors on February 15th, this Defendant's Exhibit "B," was it?

A. Presented by Mr. Dunlap, yes, sir.

Q. What were the circumstances under which it was presented?

A. Why, at a meeting the day previous, I think, Mr. Dunlap had made his claims to the Board, and the Board insisted upon an itemized bill of particulars as to what those services covered, from the fact that it would be necessary if anything was doing, to have an itemized statement of it, to be put in voucher form; and for that reason, while Mr. Dunlap objected

(Testimony of W. B. Alexander.)

to making it, still that was the result of the request.

Q. In that portion of the minutes of the meeting of February 15th, 1910, which were read into the record yesterday, reading therefrom as follows: "His efforts in behalf of the Company in securing a reduction of taxes on the properties of this Company, more particularly the taxes for the year 1907, when the tax against the mill was $3,450, which through Mr. Dunlap's efforts was reduced to $362.50, thereby effecting a saving of $2,537.50," from what source did you get the figures to insert in this resolution? A. From the brief itself.

Q. At that time had you or your office made any investigation of [146] the assessed valuation for the mill for that year? A. Not at all.

Mr. SUMMERFIELD.—I desire, if the Court please, to object to this line of evidence, until the document admitted in evidence is laid before this jury and the Court, in order that I may, if I so desire, take the proper exceptions. As it is now, the Court knows nothing about what is in this document at all.

The COURT.—Well, I presume he can take his own course about that. It is not necessary that he should read it to the jury unless he wishes to; you may examine it if you desire.

Mr. SUMMERFIELD.—I object to the question in the form propounded, on the ground it is not the best evidence. If the figures are obtained from this brief, the figures contained in the brief which has been admitted in evidence are better evidence than the recollection of this witness.

(Testimony of W. B. Alexander.)

The COURT.—He simply says that he obtained the figures from the brief; he don't say what the figures were. I will overrule the objection.

Q. Has the Company since made an investigation of the records of the County Assessor of Nye County to ascertain what the assessed valuation was?

A. Yes, sir.

Q. Were these figures correct?

A. They were not.

Q. What was the assessed valuation?

Mr. SUMMERFIELD.—I object, if the Court please, upon the ground that the better evidence is a copy of the records, if they have them.

(Objection sustained.)

Q. Was the assessed valuation more or less than that contained in the figures of Mr. Dunlap?

Same objection. Same ruling. **[147]**

Mr. THAYER.—An exception, your Honor, to both of those. The exception goes to the point that there is no presumption of the existence of any record, of what the assessed valuation of the property was which was embraced within the question.

The COURT.—I do not quite understand that exception, because there is some testimony to the effect that there was some property assessed, and that the valuation was reduced; and there is also a law in the State which provides just how that shall be entered upon the books, and we must presume the Assessor has made a record of it in the proper books, otherwise there would be no assessment, and no taxes to reduce. If there is something further in your ex-

(Testimony of W. B. Alexander.)

ception which I do not comprehend, I would like to know it before the ruling becomes final.

Mr. THAYER.—I will reach it in another way, your Honor.

Q. You stated, Mr. Alexander, that the salary of the bookkeeper was $135 a month, that you now have?

A. No, sir, $150.

Q. And of the stenographer $125? A. $125.

Q. How many men are now employed by the Montana-Tonopah Mining Company?

A. Roughly, I should say about one hundred and sixty.

Q. How many men were employed when you first became connected with the Company as bookkeeper, early in 1906?

A. I think something like sixty or seventy, possibly seventy-five.

Q. State whether or not there has been any increase in the labor of your office during this period in the increase in the number of men.

A. Why, I should say that it had trebled, easily.

Q. Can you state how many claims for accidents or personal injuries or death have been made against the Company, aside from those which were testified to by the plaintiff, during the period that the plaintiff was a director or vice-president of the Company?

[148] A. Three or four.

Q. State whether or not those claims were all settled. A. No, there is one still pending.

Q. During what period has the Company carried employers' liability insurance with the Ocean Acci-

(Testimony of W. B. Alexander.)

dent & Guaranty Company, Limited?

A. That insurance became effective on October 10th, 1908, and ended on October 10th, 1909.

Q. With reference to the claim which you have testified has not been settled, is the Company negotiating a settlement of that claim, or is the Insurance Company?

Mr. SUMMERFIELD.—I object, if the Court please, as being entirely immaterial and irrelevant to any issue in this case.

Mr. THAYER.—The question is for the purpose of showing the custom of the Company, what is ordinarily done in the course of business. The defendant's position is that whatever services the plaintiff may have rendered, have been intermeddling and gratuitous, for which he is entitled to no compensation at all, as will appear by further testimony. And we have a right, I think, by this question, to show what the custom of the Company is with reference to the settlement of claims, excepting when this plaintiff has broken into the situation, and taken charge of it himself, without any inducement or any suggestion or any request on behalf of the corporation.

The COURT.—If you can prove what the custom was at the time these settlements were made by Mr. Dunlap, I think it would be relevant; but to prove what is being done now with reference to a particular claim is not the custom; it may be the custom and may not; what you want is the general custom. You can show what the custom was while the plaintiff was in office as to the settlement of claims; I think

(Testimony of W. B. Alexander.)

that would be relevant and material, in the absence of better testimony. [149]

Q. If any negotiations were commenced with reference to this one which you say is now being sued upon, were such negotiations begun or carried on while the plaintiff was in office in the Company, do you know?

A. While he was Vice-President, yes, sir.

Q. Were they carried on by the corporation or by the Casualty Company?

A. By the Casualty Company. I wish to correct a date relating to the question where you asked me the date that the Ocean Employer's Liability insurance became effective. I think that was the question, and I stated from October 10th, 1908; I think I am wrong in that, it should be October 10th, 1907, and ending October 10th, 1908.

Q. Is the Company carrying insurance now?

A. Yes, sir.

Q. In that company?

A. No, sir, in another company.

Q. Do you know who prepared the by-laws of the Montana-Tonopah Company?

A. I don't know of my own knowledge.

Q. When did you receive them as Secretary?

A. I think it was some time during the summer of 1908.

Q. In what form were they when you received them?

A. In a typewritten form, on the regular legal size paper.

(Testimony of W. B. Alexander.)

Q. Was there anything typewritten or written on the sheets containing the by-laws excepting the by-laws themselves? A. No, sir.

Mr. SUMMERFIELD.—I ask the answer be stricken out until I can make an objection. I object to the question upon the ground that presumptively, the by-laws are in the possession of the defendant, and as to what their contents are, what they show, that they themselves are the better evidence, than the testimony of this witness; that the testimony of this witness, based upon his recollection, would be secondary, where, presumptively, primary **[150]** evidence is obtainable.

The COURT.—You can answer the question yes or no. A. Yes, sir.

Q. What was it?

Mr. SUMMERFIELD.—I object upon the grounds stated.

The COURT.—I shall sustain the objection thus far, that anything as to the contents or character will be excluded; he might say whether it was a piece of parchment, or a piece of paper, but the contents of it will have to be shown, as the matter stands now, by the record itself.

Q. Where are those sheets which were originally given to you to be the by-laws of the Company?

A. In the Company's vault at Tonopah.

Q. You have not them here? A. I have not.

Q. Were the by-laws themselves ever copied?

A. Yes, sir.

Q. Copied from these sheets?

(Testimony of W. B. Alexander.)

A. From the original sheets.

Q. Do the by-laws as copied into the by-law book of the Company contain anything excepting the by-laws? A. Nothing.

Q. The matter which was written or typewritten upon the sheets, which was not by-laws, was excluded in the copy? A. Eliminated, yes, sir.

Q. What do the minutes of the meetings contain with reference to what occurs at a meeting of the Board of Directors?

Mr. SUMMERFIELD.—I object to that question, if the Court please, upon the ground that any answer responsive to the question would be as to the contents of the minutes, and would be secondary evidence; that the minutes themselves are the primary evidence, and the best evidence of what the minutes contain.

The COURT.—I will permit that question to be answered generally, but there cannot be any detail. **[151]**

A. Merely matters upon which action has been taken.

Q. Do you put into the minutes discussions or questions that arise with reference to questions before the Board of Directors, unless affirmative or negative action is taken thereon?

A. Why, there have been instances where it has been done, but it is not the rule, it has not been my custom.

Q. I will ask you, Mr. Alexander, if you have examined the minute-book since the adjournment of

(Testimony of W. B. Alexander.)
last night, and whether or not there is anything in the minutes, authorizing anyone to make any settlement of the taxes which were in dispute during the year of 1907 and 1908? A. There is not.

The COURT.—Wait a minute.

Mr. SUMMERFIELD.—Objected to, if the Court please, as calling for the conclusion of the witness as to what authority is conferred by the minutes, which is a question of law to be deduced from the minutes themselves; and secondly, upon the ground that it seeks to elicit from this witness through oral testimony, what the minutes themselves contain; and that the minutes are the primary and the best evidence of their contents.

The COURT.—It is not to show what is in the minutes, but what is not there. Of course, if the question involves a conclusion of law, it would be objectionable, but he can answer the question as to whether there is anything in the books with reference to such matter as that, and if it be there, it will be submitted for examination, and the Court, or the jury, will determine whether it is an authorization or not.

Mr. SUMMERFIELD.—I agree with your Honor if the question were framed that way, but unless I am mistaken the question is whether there is anything in the minutes authorizing a certain thing.

The COURT.—Well, I presume it was used as a general term. [152]

Mr. THAYER.—That was all; it was not intended to draw out of this witness the contents of any of the minutes.

(Testimony of W. B. Alexander.)

Q. State whether or not, Mr. Alexander, there is anything in the minutes of the meetings of the directors of the Montana-Tonopah Mining Company, with reference to any settlement of the tax disputes which existed between the Montana-Tonopah Mining Company and the Board of County Commissioners of Nye County, Nevada, during the year 1907 and 1908? A. There is not.

Q. Did you talk with Mr. Dunlap any more frequently than you did with Mr. Lynch, or whoever happened to be the other resident director in Tonopah?

A. I think I did, from the fact that he was there on the hill, and I saw him oftener.

Q. He lived up at the mine, did he?

A. On the hill, yes, sir.

Q. Did you talk with Mr. Lynch frequently.

A. Very frequently, and lots of times over the phone.

Q. Will you state to the Court and jury the nature of your conversations with Mr. Lynch as compared with the nature of your conversations with Mr. Dunlap?

A. Why, they were practically the same, calling his attention to matters that probably had been acted upon, and concerned the Company; I don't know that I called Mr. Lynch's attention to stock matters particularly, except during the San Francisco fire; that was a little bit more of a bonding proposition, from the fact that there was so much of that lost or destroyed, claims coming in for the lost stock. **[153]**

(Testimony of W. B. Alexander.)

Recross-examination.

Q. Of course, you are familiar with the minutes, Mr. Alexander, having been the Secretary of the Company?

A. Why, I feel that I am somewhat; of course, I do not pretend to remember them all.

Q. And your answer to counsel who has last questioned you to the effect that there is nothing in the minutes with reference to the settlement and adjustment of these tax matters was made advisedly, wasn't it? A. Yes, sir, I think so.

Q. Will you look at the minutes of February 15th, 1910, on page 106, and see whether there is anything with reference to that? (Hands book to witness.)

A. Yes, sir. The question was during the years 1908 and 1909; this is 1910.

Q. The question was with reference to what?

A. The question was whether there was anything of that nature during the years 1908 and 1909; this particular place you have called my attention to is in 1910.

Q. And is not that with reference to the taxes for those years that you were asked about, as contained in these minutes?

A. I don't understand the question that way; it was during the years 1908 and 1909, if I remember correctly.

Q. The reference in the minutes which I have shown to you, did and does refer to the adjustment of those taxes for the very years that counsel asked you about; now is not that true?

(Testimony of W. B. Alexander.)

A. No, sir, that was during the year 1910 that the minutes refer.

Q. But in the minutes of 1910, which I have just pointed out to you, Mr. Alexander, in those minutes referring to the settlement and adjustment of tax matters, were not the tax matters therein **[154]** mentioned the tax matters of the years of 1907 and 1909?

A. They were; but the meeting that it refers to was in 1910.

Q. Of course I want to be absolutely fair; you understood that the question was directed as to whether there was anything contained in the minutes for those years?

A. Yes, sir, and it was on that basis that I made my answer.

Q. You were asked by counsel about a certain number of claims being adjusted, I don't remember the names of them, you said there were four or five?

A. Why, yes, Antone Bosso, and Jimmie Burns, A. L. Brown, and I think there were one or two more.

Q. Is it not true most of those claims were settled by the Casualty Company, or Indemnity Company?

A. No, as a matter of fact, the Bosso case was one when we did not have any employers' liability insurance; the Burns' case was one when we did; but, as a matter of fact, it was not so much a question of whether we had employers' liability or not; it was more a question of the moral phase of the matter, to help out an employee who had done good work for us, rather than the legal obligation. As a matter of

(Testimony of W. B. Alexander.)

fact, the legal end of it was not considered until it was turned over to the Insurance Company; but we tried to help the fellow out, whoever he was.

Q. Is it not true, Mr. Alexander, that ever since you have been connected with the Company, that to the best of your knowledge there has never been a single case of that kind, in which it has not been the contention of the Montana-Tonopah Mining Company that it was under no legal obligations whatever?

A. That is why I say that it did not relate to the legal obligation at all; it was the moral obligation.

Q. And these settlements and adjustments have all been made, then, **[155]** if I understand you correctly, because the Company felt that they might be morally liable, but were not legally liable; that is correct, is it?

A. Well, I can recall one instance, in the Merton case that was mentioned, where the Company paid the burial expense; I do not recall the amount, but there was a clause in that policy permitting the insured to pay, I think it stated first aid or burial expenses, provided the insured stood 20 per cent of that expense; in other words, the insurance company would pay 80 per cent if the insured paid 20 per cent of it, and limiting the amount, I think, to $125.

[Testimony of Edgar A. Collins, for Defendant.]

Mr. EDGAR A. COLLINS, a witness called by defendant, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. THAYER.)

Q. State your name, please.

(Testimony of Edgar A. Collins.)

A. Edgar A. Collins.

Q. What is your occupation, Mr. Collins?

A. Superintendent of the Montana-Tonopah Mining Company.

Q. How long have you been connected with that Company? A. Since March 15th, 1907.

Q. You are referring to the Company which is the defendant in this action, are you? A. Yes, sir.

Q. State the circumstances under which you were employed by the Company?

A. I was first of all offered, or asked if I would accept the position of superintendent in a telegram from Mr. Knox, and on what terms, and having further discussion with Mr. Dunlap and Mr. Carr, as Mr. Knox's representatives, why, I accepted the position, and was informed that the Board of Directors tendered me **[156]** the position at the terms agreed upon, and I accepted.

Q. And you have been occupying that position ever since? A. Yes, sir.

Q. What duties do you perform as general superintendent?

A. I have charge of the operations of the Company, including the planning and direction of all mine work; supervision and direction of the mill work, and all other surface work; in fact, the complete operation of the Company. In addition to that, connection with that, I authorize the purchase of supplies for the different departments, and buy or purchase any additional machinery required, and countersign all the checks.

(Testimony of Edgar A. Collins.)

Q. Do you happen to know from your official position of any accidents which have occurred in connection with the operations of the Company?

A. Yes, sir.

Q. Will you relate them?

A. The first accident was to a trammer in the mine, named Antone Bosso, about some time in May, 1907, he was working on the night shift, climbing from a drift which they had been blasting on the day shift, and as he started his car, a rock fell and broke his ankle, and I notified Mr. Knox by letter of the case, and informed him that I did not know whether, I did not suppose we were legally responsible for the accident, but I thought we were morally, to some extent; it was not very serious, and that I felt sure we could settle it for some comparatively small amount; and Mr. Knox advised me by letter that it was all right, to go ahead and make such settlement. Antone Bosso came up to the office, probably a month after the accident, with his representative, an attorney in town; and in my office there, in the presence of Mr. Alexander, we discussed the case with him, and finally settled for, I think it **[157]** was four hundred dollars, which represented the time he had lost, and the time which would be necessary before he would be able to come back to work, he would be given this position again; that being satisfactory, the check was made out then by Mr. Alexander, and given to Antone Bosso. The next accident—

Q. Just a moment. Is Bosso working for the Company now? A. Yes, sir.

(Testimony of Edgar A. Collins.)

Q. And has been ever since? A. Yes, sir.

Q. Did anybody advise with you with reference to the settlement?

A. Why, I advised with Mr. Alexander.

Q. Anyone else? A. Mr. Knox.

Q. Anyone else? A. No.

Q. When you speak of the representative that went up to the mine with Bosso, you mean by that he was a representative in what capacity?

A. Well, as an interpreter; Antone Bosso could not talk English very well, and he needed an interpreter.

Q. And the next accident?

A. The next accident was Alex Ursin and Jack Smeigh, the two men who were injured coming in contact with a high voltage wire in the transformer house, just before the mill was completed; that was some time in the end of January, 1907; and that was reported to Mr. Knox in the same way; and the first thing that I recall is that after they were able to be around on the street, when Mr. Knox next came to Tonopah, he arranged to have the two men come up to the Company's club-house on the hill so that he could have a talk with them, because we had heard that they contemplated bringing a suit. They came up to the club-house and Mr. Knox and myself sat there about two hours talking to them.

Q. Anyone else there? **[158]**

A. No, sir. No settlement was reached at that time at all, but the matter was left open. The next notification I had was a letter from Mr. Gibbons, an

(Testimony of Edgar A. Collins.)

attorney in Tonopah, stating that the two men had consulted him in regard to a lawsuit, and that if the Company wished to do anything we had better get busy, and I notified Mr. Knox of that, he was then in Philadephia, I believe; shortly afterwards I got a letter from him, stating that he had taken the matter up with the eastern directors, and that they had come to the conclusion that the Company had better compromise, rather than have any trouble, and he authorized me to inform Mr. Gibbons that the Company would settle that suit, but the terms of it would have to wait until Mr. Knox returned to Tonopah, and could take them up. The next thing that I recall—

Q. Did you notify the attorney?

A. I went down and notified Mr. Gibbons that same afternoon on the way home. The next occurrence in regard to that same case was when Mr. Knox returned to Tonopah, which was probably three or four weeks later; I accompanied him down town to Mr. Gibbons' office; I believe we previously telephoned Mr. Gibbons, and asked him to have Alex Ursin and Jack Smeigh there in his office, and the terms of settlement were discussed by Mr. Knox and the two men in my presence, and the amounts were settled to mutual satisfaction.

Q. Did you sign checks for the settlement?

A. Yes, I countersigned them.

Q. State whether or not these men are still within the employ of the Company.

A. No, by the terms of the settlement, one of them

(Testimony of Edgar A. Collins.)

preferred to have six months' salary and go away, he wanted to go away to some **[159]** other part of the country; he was much less injured than the other man; Alex Ursin was much more seriously injured than the other man and he preferred to take a lump sum and a permanent job as watchman for the Company as long as the Company retained its property.

Q. Is he with the Company?

A. He has been with the Company until about two months and a half ago, when he asked for a month or six weeks' vacation to go up into Oregon, and he has not got back yet, but the job will be open for him when he returns.

Q. The next accident?

A. The next accident was that to Swope, on or about October 9th, the same year. I reported that as usual to Mr. Knox, and after Swope was able to be around, about one of the first days he could walk up the hill, we asked him to come up and see us anyway, and he came up on the hill, and came into my office, and Mr. Alexander and I talked with him there, oh, an hour maybe, asking him what he thought the Company should do, if anything, for him, without getting anything definite out of him whatever; in fact, he would express nothing at all one way or the other; and as I heard and could judge by the way he spoke, he contemplated bringing suit; I wrote to Mr. Knox fully and explained exactly how the matter was and how Swope felt, and suggested he would be in Independence just about the time my letter got there, and

(Testimony of Edgar A. Collins.)
that he could probably do something with Swope's relations, as I knew he knew them personally; and I telegraphed him that this letter was coming, it was an important letter, and to look out for it, and he did so. Outside of that, I know nothing about the case, except I know it was settled.

Q. What was the next accident you know anything about? **[160]**

A. The next accident was to a young man named Sherman, in the mill.

Q. What is the status of that claim now?

A. That is still pending, and I understand he is bringing suit against the Company.

Q. Do you know who is attending to that?

A. The Insurance Company is doing that, we have had nothing whatever to do with that, no compromise, or anything.

Q. What is the next accident with which you are familiar?

A. The next one I am familiar with is when young Merton was killed, sometime in April, 1909, was killed just as the night shift came off shift; he was coming up on the cage and fainted, and was crushed between the cage and one of the shaft timbers. The first notification I had of it was a few minutes later, Mr. Pengelle, night foreman, telephoned me at my house, and told me a man had just been killed coming up on the cage; he knew no details at that time; that the body had been taken into the change-house, and asked what we wished done, and I told him I presumed the first

(Testimony of Edgar A. Collins.)

thing to do was to notify the coroner, and I asked him who the coroner was; I didn't know at the time just who he was; Mr. Pengelle said he didn't know, and I said, "I will find out," and just at that moment Mr. Dunlap took the telephone, and said, "Why, it is Harry Atkinson."

Q. Be more explicit, was Mr. Dunlap at your end of the line, or at the other end of the line?

A. I was on my end of the line, and Mr. Dunlap took the telephone from Mr. Pengelle, and said, "The coroner is Harry Atkinson; don't you bother about this; I will attend to it." The next thing I knew about the case was two or three days later, as I was coming home I met Mr. Dunlap at the corner of the street down town and **[161]** stood talking for a few minutes, and he said to me, "Collins, what do you think of paying the funeral expenses of young Merton? The people are hard up and need the money. Don't you think it would be a good thing for us to do?" And I said, "Yes, I do," the same thought had occurred to me, and I was thinking of bringing it up. "Well," he said, "if you think it is all right, we will do it," and I said, "Yes, I do." "Well," he said, "I am going up this evening to see those people, and I will tell them that is what we will do," and outside of going to the funeral that is all that ever came up in that case. The next case was a young man named Burns; he was injured in the mine.

Mr. SUMMERFIELD.—(Q.) When?

A. On or about between the 1st and 12th of Novem-

(Testimony of Edgar A. Collins.)

ber, 1909; it was a very slight injury, but the man afterwards died of blood-poisoning, and no claim was ever made of course, and nothing was ever settled; but at the time the young man did not seem to be getting proper treatment at the local hospital, at the Miners' Union Hospital by the Miners' Union doctor, and he himself called in and several of his friends came to Mr. Alexander and myself and asked us if the Company would not try and persuade Jimmie Burns to call in another surgeon, at least have an another examination.

Q. Well, Mr. Collins, I don't believe it is necessary to take up the time of the Court with the details of that.

A. Well, the only thing was that I engaged Doctor Clarke to examine him, and afterwards to give him the best attention that he could; and Doctor Clarke attended to him until a few days before he died, when he told Doctor Clarke he no longer wanted his services; and Doctor Clarke was paid the sum of $250, or thereabouts, for his services.

Q. Was there any other accident? **[162]**

A. The only other accident was that to Brown, a carpenter at the mine, he was injured by a circular saw, the rope holding back the circular saw, breaking, and almost being cut open.

Mr. SUMMERFIELD.—(Q.) When was that?

A. That was in November, 1909; and as soon as Mr. Brown was able to come back on the hill, which was three or four weeks after the accident happened, he

(Testimony of Edgar A. Collins.)

went to work again; and I had a conversation with him in which he told me that his doctor bill was going to be pretty heavy, that he didn't think the Company was responsible for the accident at all, or owed him anything, but if the Company could give him any help it would be very much appreciated; I told him that both Mr. Alexander and myself felt that the Company should do something for him, simply because he had been in our service a long time, and had been a very faithful employee, and that I would take it up with Mr. Knox as soon as he returned to camp. I took it up with Mr. Knox two or three weeks later, and he agreed that we would do something, and asked me to send over and get Mr. Brown to come to the office: Mr. Brown came over, and Mr. Knox and Mr. Alexander and myself talked the thing over with him, and asked how much he thought he was entitled to; and he said anything at all which the Company offered he would be very glad to accept. Mr. Knox asked me how much I thought we ought to do for Brown, and I told him that I thought if he paid his own doctor's bill, and that we would pay him for the time he had been absent from work, and the time which would be necessary before he could go to work again, I thought that would be very fair; that amounted to something in the neighborhood of $450; that was very satisfactory to Brown, and the payment was made that afternoon.

Q. Is he still working for the Company? **[163]**

A. He is still working for the Company.

(Testimony of Edgar A. Collins.)

Q. How many of the men who have been injured while working for the Montana-Tonopah Mining Company, and who have remained in the community, are not working for the Company to-day, Mr. Collins?

Mr. SUMMERFIELD.—I object, if the Court please, as being entirely immaterial, and encumbering the record.

(Objection sustained.)

Q. What was the policy of the Company with reference to accidents occurring in the mine and mill of the Company?

Mr. SUMMERFIELD.—Object to that as calling simply for the conclusion of the witness, not what the Company did, and what would constitute a policy would hardly be evidentiary, I think.

The COURT.—I do not see where that is material. Where does it have any bearing on the question as to whether plaintiff is entitled to compensation for his services?

Mr. THAYER.—Simply to rebut the testimony elicited by counsel for plaintiff that this corporation always claimed that it was never legally responsible for any injury.

The COURT.—I understood that was the testimony of Mr. Alexander.

Mr. SUMMERFIELD.—It was on cross-examination.

The COURT.—There was no objection made to that?

Mr. THAYER.—It was on direct examination, be-

(Testimony of Edgar A. Collins.)

cause there was nothing to make it cross-examination; and I do not understand that it is necessary to make an objection, where it appears upon the face of the record that a witness is being made a witness of the opponent, and is asked questions which are not questions in cross-examination; by that fact he becomes the witness for the opponent.

The COURT.—I cannot see that it is material; and if the objection had been made to the other question, it would have been ruled **[164]** out. I do not see where the question that was asked or this question, throws any light upon the question before the jury, as to whether Mr. Dunlap is entitled to compensation or not.

Mr. THAYER.—I reserve an exception, if your Honor please.

Q. Did you have conferences with various members of the Board of Directors, Mr. Collins?

A. Very, very seldom.

Q. Did you have any conferences with Mr. Dunlap?

A. Not in the nature of consultations. I talked over—

Q. Did Mr. Dunlap ever advise you with reference to the operations of the property of the Company?

A. Never.

Q. Did you ever ask his opinion on any matters in connection with the Company?

A. Yes, I probably asked his opinion, in a way.

Q. For what purpose?

A. Well, he was Vice-President, out of deference

(Testimony of Edgar A. Collins.)
to him; I used to meet him every day at lunch there at the club-house; he would ask if there was anything new down in the mine very often, and I would tell him if there was anything new, and I would tell him the information simply because he was an officer of the Company.

Q. Did you ever accept his advice or follow his advice in anything relating to the Company?

A. Not that I know of; if I ever did it was because it agreed with my own views; I considered myself responsible for everything that I ever did.

Q. Did you ever have any consultations with Mr. Lynch?

A. Well, in the same way, in simply talking over business, asking him his opinion on some point, or giving him mine.

Q. What was the purpose of your conversations with Mr. Lynch?

Mr. SUMMERFIELD.—I object to that, if the Court please, as being immaterial to any issue involved, as to what the purpose of his conversations with Mr. Lynch was. **[165]**

The COURT.—I do not see where it is material at the present time.

Mr. THAYER.—Because we have to show the customs of the operations of this Company in some way.

The COURT.—Well, I will allow it; but it does seem very strange that a Company of this kind should have no by-laws, and must prove everything of that kind by custom.

(Testimony of Edgar A. Collins.)

Q. Will you answer the question?

A. Whatever matters I may have talked over with Mr. Lynch was with the same view, that he was a director of the Company.

The COURT.—You are simply proving what the custom was, and the question, if I recollect, was, what was the purpose of these consultations with Mr. Lynch; I do not care to go into the details of them; but you can state generally, the purpose.

Q. Why did you talk to Mr. Lynch?

A. Because I thought he would be interested.

Q. Why should he be interested?

A. As a director of the Company.

Q. How long have you been in the mining business, Mr. Collins? A. About fifteen years.

Q. In your position as superintendent at the Montana-Tonopah mine, state whether or not you know what Mr. Dunlap has done for the Company during the period you have been there, what results he has accomplished, what services he has rendered.

A. I don't know of my own knowledge.

Q. Do you know of his ever accomplishing anything for the Company?

A. I know he appeared before the Board of Equalization.

Q. Do you know that he ever accomplished anything for the Company which was worth any amount in money to the Company? **[166]**

Mr. SUMMERFIELD.—Object to that as calling for a response not evidentiary in character, and a

mere opinion of the witness, and not based upon any knowledge of his doing anything at all.

The COURT.—I think it would be better to ask what he has done.

Q. Well, what has he done?

A. I know he appeared before the Board of Equalization; and I know he has had a good deal to say in regard to certain questions of interest around the office as they came up; I have heard him discussing with Mr. Alexander at times.

Q. He had a good deal to say? A. Yes, sir.

Q. You have occupied similar positions to this before? A. Yes, sir.

Q. You are familiar with the management of mining corporations? A. Yes, sir.

Q. State whether or not from such experience you are familiar with the value of the services which are claimed to have been services rendered by Mr. Dunlap to the corporation? A. I think so.

Q. What are the services which Mr. Dunlap rendered to the corporation worth, in your opinion?

A. Well, outside of signing certificates, in my opinion, since I have been connected with the Company, they are worth less than nothing, because they simply embarrassed—

The COURT.—Well, you need not give your reasons until they are asked for.

Q. Why were they worth less than nothing?

A. They simply embarrassed and retarded Mr. Alexander and myself in the exercise of our duties.

(Testimony of Edgar A. Collins.)

Cross-examination.

Q. (Mr. SUMMERFIELD.) You say you became Superintendent of the Company in the year 1906, Mr. Collins? A. 1907.

Q. Where did you live before that time?

A. In Goldfield.

Q. Not at Tonopah? A. No, sir.

Q. You knew nothing about the Montana-Tonopah Company's properties or its operations at that time?

A. Yes, sir.

Q. You did have knowledge of them?

A. Yes, sir.

Q. How did you acquire such knowledge if you lived at Goldfield and those properties were situated at Tonopah?

A. Well, I had met both Mr. Knox and Mr. Dunlap, and I had been underground at the Montana mine, and had been over its surface work.

Q. And what you did know before you went there was based upon the meetings with Mr. Knox and Mr. Dunlap, and you had been underground once?

A. Yes; and the general knowledge that you have of mines in the same district.

Q. Did you know anything about the operations of those mines during that time, while you lived in Goldfield, and before you went to Tonopah in the employment of this Company?

A. I knew who the officials were connected with the Company.

Q. You knew the officials, you had met them? I

(Testimony of Edgar A. Collins.)

wanted to know if you knew anything about its operations, its conduct of business? A. Very little.

Q. Its management and the way it was managed?

A. Very little.

Q. Very little about that. You have been in the employment of the Company ever since you went there as its superintendent, and are in such employment at the present time? A. Yes, sir.

Q. And it is your judgment, based upon your experience as a mining **[168]** man of fifteen years' extent, as I understand it, that Mr. Dunlap was a positive detriment, an obstacle and a stumbling block to you and to Mr. Alexander, and to the operating officers of that Company, is that correct?

A. During my connection, yes.

Q. Your connection has been since the time you stated; you have been there ever since? A. Yes.

Q. And during that time, for over three years, Mr. Dunlap was the Vice-President of the Company, and a director of the Company? A. Yes, sir.

Q. And during all of that time he was a detriment to the Company and an obstacle?

A. I did not say that; I said outside of his duties as a Vice-President.

Q. Outside of his duties as a Vice-President?

A. Yes, sir.

Q. What were his duties as a Vice-President?

Mr. THAYER.—I object to that question as not cross-examination and calling for a conclusion of the witness.

(Testimony of Edgar A. Collins.)

The COURT.—I think so.

Q. What did he do as Vice-President?

A. He signed stock certificates, and presided at directors' meetings in the absence of the President.

Q. Did he do anything else?

A. Well, I presume he appeared before the Board of Equalization in his capacity of director.

Q. You frequently called on him, did you not, during the period of time which you have mentioned, for a conference with him regarding the Company's affairs? A. No, sir.

Q. I understood you to testify that you frequently conversed with him about them out of deference to him as Vice-President, is that correct?

A. I did. **[169]**

Q. Was that of your initiative, or was it upon his initiative?

A. Sometimes one, sometimes another; sometimes he would bring up some question at lunch, and sometimes I would; I never asked for advice or counsel.

Q. Well, if you considered that he was a detriment to you, why did you bring up the subjects at all?

A. Purely out of deference to his position, and to have something to talk about.

Q. It was for the purpose of bringing up some subject that you could talk about, was that the idea?

A. Certainly.

Q. It was not, then, because of any particular interest in the affairs of the Company, that either he had or you had?

(Testimony of Edgar A. Collins.)

A. It was partly that, too; he was interested, naturally, as a director; and, as I said, very often I would ask his opinion on some point.

Q. During any of those times which you have mentioned, did you ever state to him or suggest to him, that you considered him detrimental to the interests of the Company, or to yourself in the discharge of your duties? A. Well, hardly.

Q. Now, you don't know of your own knowledge, whether Mr. Dunlap had anything to do with the settlement or adjustment of any of these cases at all or not, do you? A. No, I don't. **[170]**

[Testimony of Thomas J. Lynch, for Defendant.]

Mr. THOMAS J. LYNCH, a witness called by defendant, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. THAYER.)

Q. State your name, please.

A. Thomas J. Lynch.

Q. Where do you reside? A. Tonopah.

Q. What connection, if any, have you, or have you had with the Montana-Tonopah Mining Company since its organization, relate it briefly?

A. Why, I was the person who negotiated the original purchase of the ground on which the Lucky Jim claim was, the Montana-Tonopah Company, I was one of its original incorporators, and was a director for a time, and resigned, and afterwards became a director again, which I am at the present time.

Q. When did you first resign?

(Testimony of Thomas J. Lynch.)

A. I resigned in May, 1903.

Q. When were you elected the second time?

A. In September, 1905.

Q. Have you remained a director since?

A. I have.

Q. You reside in Tonopah? A. I do.

Q. Do you hold any other office in connection with the defendant corporation than that of director?

A. None.

Q. You were present in Tonopah, Mr. Lynch, at the time that the Mitchell accident case was settled?

A. I was.

Q. Will you state what connection you had with the settlement of that matter, and the incidents surrounding it?

A. Well, I heard that a man had been killed, and I knew the young man who was working in the shaft with Mitchell, a boy named Johns, and of course I was interested in the property as a stockholder. **[171]**

Q. This occurred at a period when you were not a director?

A. Yes; I was not a director at that time, it was in 1904, I think. I met Mr. Dunlap downtown, and I said, "A man has been killed," and he said, "Yes"; he says, "I am going up to the house now, the widow's house, Mrs. Mitchell's house," and I turned around and walked up with him, and as we got there, we went around in back of the house and looked in the door, and there was a little girl there, a little daughter, I presume it was a daughter of the lady

(Testimony of Thomas J. Lynch.)

of the house, and I asked her where her mother was, and she said she was behind a screen; there was a screen, as I remember, in the center of the room, and just about that time a neighbor told me they had nothing in the house, not a crust of bread even, so I asked the little girl for her mother, and as she came out, which she did, I walked in and put my hand in my pocket and took out five twenty-dollar gold pieces, and put them on the table in front of the lady; she sat down as she came out, and I asked her this question, if she had anything in the house, and she said no, and I put the hundred dollars in front of her.

Q. You gave her the money?

A. I gave her the money.

Q. Was that money refunded to you?

A. It was; yes, sir.

Q. By the Company?

A. By the check of the Montana-Tonopah Mining Company some days later.

Q. You were on a committee to prepare the by-laws for the Company, were you not?

A. Yes, sir, I was.

Q. What did that committee do?

A. Why, I don't know as they did anything; I didn't do anything.

Q. Who prepared the by-laws?

A. I can't say, I don't know who prepared them.

Q. Did you ever see them?

A. Never did. **[172]**

Q. Did you meet frequently with Mr. McQuillan

(Testimony of Thomas J. Lynch.)

and Mr. Dunlap at Mr. Dunlap's office to work on the by-laws?

A. Never met, to my recollection, on the by-law question. To frame by-laws, I understand?

Q. Yes. A. Yes, sir.

Q. You were on the committee to prepare the by-laws for the Company?

A. Yes, I was; I was appointed, I remember.

Q. Do you know of any directors' meetings being held at Mr. Dunlap's office?

A. Why, I have a faint recollection of one meeting that I attended there, I think an adjourned meeting.

Q. How many meetings have you attended of the Board of Directors?

A. Well, I have attended every one, except one that I was not present at, while I was in Tonopah.

Q. How long have you known Mr. Dunlap?

A. I have known him since 1902.

Q. When did your acquaintance with him begin?

A. My first recollection of meeting Mr. Dunlap was in Ogden, Utah.

Q. How long had you seen him there?

A. We were gettting off the train, going east, going to Salt Lake City, and Mr. Knox and Mr. Dunlap, I think were on the train, the trains, as I recollect, the overlands met there, and we just shook hands and began an acquaintance, that is all.

Q. Did you have any further acquaintance with him before he came to Tonopah to live?

A. He called on me once in Kansas City, we met

(Testimony of Thomas J. Lynch.)

there at the Baltimore Hotel.

Q. Did you meet him on any other occasion before he came to Tonopah?

A. No, I don't remember of any other occasion.

Q. So the time when you were first introduced to him and the time when you met him at the Baltimore Hotel were the only occasions **[173]** on which you had met him before he came to Tonopah?

A. Yes, those are the only two which I recollect.

Q. Do you know whether or not Mr. Dunlap was engaged in any business in Tonopah while he was Secretary and Treasurer of the Montana-Tonopah Company?

A. Why, he was engaged in his personal business.

Q. Do you know whether or not he had any stock business?

A. Why, his secretary, a young gentleman who was in the office there, told me they were doing something of a stock business.

Mr. SUMMERFIELD.—I object to that as hearsay.

The COURT.—It may be stricken out.

Q. Do you know of your own knowledge?

A. No, I don't, of my own absolute knowledge.

Q. Do you know whether Mr. Dunlap gave up all of his time to his duties as Secretary and Treasurer of the Montana-Tonopah Mining Company?

A. No, I know he did not.

Q. Do you know what else he did do?

A. Well, he busied himself around in acquiring properties and stock, and interests around the coun-

(Testimony of Thomas J. Lynch.)

try, like we all did.

Q. Did he have any assistance as Secretary and Treasurer of the Company during this period?

A. He did.

Q. Who was it?

A. A young gentleman, Don C. Aldrich.

Q. Was he paid by the Montana-Tonopah Company? A. Yes, sir, as far as I know.

Q. Were you present at any meeting of the Board of Directors of the Montana-Tonopah Mining Company in 1907 or 1908, at which there was discussed any controversy between the Company and the Board of County Commissioners with reference to taxes? A. What months was that?

Q. I am not giving the months, during the year 1907 or 1908? **[174]**

A. Yes, I recollect a meeting in which we discussed something about taxes.

Q. There is no reference to this in the minutes of the meetings for those two years; do you recall what occurred, what the nature of this discussion was, what was said about it?

A. Well, my recollection of it was that we had been over assessed on the milling plant.

Q. Do you know whether or not any action was taken at that meeting with reference to it?

A. Well, I remember that Mr. Knox suggested to Mr. Alexander to write a letter to the proper authorities at the courthouse, stating their claim, setting forth their idea of the assessment.

Q. Do you recall whether or not Mr. Dunlap made

(Testimony of Thomas J. Lynch.)

any remark at that time?

A. I don't remember that particularly.

Q. Do you know of your own knowledge, what was the assessed valuation of the mill for that year of 1907? A. I do.

Q. What was it? A. $58,333.

Q. That was the original assessed valuation for that year of 1907?

A. Yes, sir, according to the books.

Q. What reduction was made in the assessed valuation? A. There was a reduction of $33,333.

Q. Bringing the entire assessed valuation down to $25,000? A. Yes, sir; $25,000.

Q. By that reduction state what, if anything, was saved to the Company.

A. Well, there was a saving of $3.45 a hundred on $33,333, something over—

Q. Can you give the figures of what the actual saving was?

A. No, something about $1,100, a little over $1,100.

Q. Between eleven and twelve hundred dollars?

A. I can calculate it, but I have not got it here.

[175]

Q. You were present at the meeting of the Board of Directors held February 15th, 1910, were you?

A. I was.

Q. You were present at the time Mr. Dunlap submitted his statement as to his claim against the Company? A. I was.

Q. It is in evidence that his statement shows "In 1907 our mill was listed at $100,000, which at the pre-

(Testimony of Thomas J. Lynch.)

vailing rate 3.45 per $100.00 would have cost in taxes $3,450.00''; the figures therein stated are not correct, are they? A. They are not.

Q. Were you present at the time the resolution, a portion of which has been introduced in evidence, was adopted, and which recites, ''The taxes for the year 1907, when the tax against the mill was $3,450, which through Mr. Dunlap's efforts was reduced to $862.50''?

A. Yes, sir, in February, as I understand it.

Q. February 15th, 1910? A. Yes, sir.

Q. Does that resolution correctly recite the fact?

Mr. SUMMERFIELD.—Object, if the Court please, upon the ground that the testimony is immaterial, it being an attempt by mere oral testimony to impeach the minutes of the Company of a meeting at which time the witness was one of the directors participating; and unless it is claimed that there was fraud committed by someone in the matter of the preparation of these minutes, such testimony is inadmissible.

The COURT.—I will overrule the objection. The minutes are *prima facie* evidence of what they contain, of course, but if they are incorrect, I think oral testimony can be introduced to correct them.

Mr. SUMMERFIELD.—I will ask for the benefit of an exception upon the grounds stated in the objection.

A. No, it does not. **[176]**

Q. What was the rate of taxation for that year, if you know? A. 3.45 a hundred.

(Testimony of Thomas J. Lynch.)

Q. And the amount given here is the amount upon $100,000, as stated in Mr. Dunlap's statement?

A. Yes, sir, $3,450, as I understand.

Q. How long have you been in the mining business, Mr. Lynch? A. About fourteen years.

Q. You have had experience in Tonopah in connection with mining corporations, have you?

A. All my experience in Tonopah has been with corporations, yes, sir.

Q. Do you know what Mr. Dunlap has done, what services he has rendered or attempted to render to the corporation, to the Montana-Tonopah Company?

A. Do I know what services he has rendered?

Q. Yes.

A. Yes, sir, I know what services he has attempted to render.

Q. Are you familiar with the value of services of the character which he has rendered, or claims to have rendered to this Company? A. Yes, sir.

Q. What is the value of the services which Mr. Dunlap has rendered to the Montana-Tonopah Mining Company?

A. Well, outside of his position as director and Vice-President, the real value of his services to the Company, I don't think they are of any value, I don't think they have any value outside of his position as director and Vice-President, because I wish to state I have performed those same services myself for several corporations that I was interested in.

Q. Have you for this corporation?

A. Why, I have on one or two occasions, yes.

(Testimony of Thomas J. Lynch.)

Q. You have attended all of the meetings except one, you say? **[177]**

A. Well, I don't want to be confined to one; that is the only one that I really remember, where I should have been present and was asked why I was not.

Q. The custom was to hold monthly meetings of the Board in Tonopah?

A. Yes, I was away from Tonopah for some time, and of course I was not at any of the meetings that were held in my absence.

Q. State whether or not you have consulted with Mr. Collins and Mr. Alexander as to the general policy of the Company, outside of directors' meetings.

A. I have; I have asked them over the phone of various things that were happening up at the mine.

Q. And they have communicated with you?

A. Yes, sir.

Recess until 1:30 P. M.

AFTERNOON SESSION.

Cross-examination of Mr. THOMAS J. LYNCH.

Q. (Mr. SUMMERFIELD.) You were an original incorporator and negotiator for the purchase of the property of the defendant Company?

A. The one claim, the Lucky Jim claim of the defendant Company.

Q. Of one claim?

A. The Lucky Jim claim, that is where the shaft is situated and where the building stands.

Q. You were an incorporator of the Company?

A. Yes, sir.

(Testimony of Thomas J. Lynch.)

Q. And have been connected with the Company ever since?

A. With the exception of when I resigned, as I said.

Q. There was an interim for a short period of time when you were not a director, and then you were again elected?

A. Nearly two years and a half, I should judge.

Q. What years were those?

A. From 1903, I can tell you the exact dates; I resigned on the 4th of May, 1903, and my resignation was accepted on the 12th of **[178]** May, 1903, and I was re-elected on the 12th day of September, 1905.

Q. Since that time you have been connected with the directorate of the Company? A. Since 1905.

Q. As a director? A. Yes, sir.

Q. And you never held any other position in the Company except as director, did you?

A. No, I never did.

Q. You have been engaged in various other enterprises there at Tonopah, have you not?

A. I have been engaged in mining there and elsewhere, outside of Tonopah, in the vicinity.

Q. Well, all the time within this State?

A. Yes, sir.

Q. And would you say in Nye County and Esmeralda County? A. Nye and Esmeralda; yes, sir.

Q. Never absent from Tonopah for any great length of time?

A. Yes, I have been absent from Tonopah as long as three months at a time; maybe more than that,

(Testimony of Thomas J. Lynch.)

too, at times.

Q. You knew Mr. Dunlap when he became Secretary of the defendant Company?

A. I did, yes, sir.

Q. And you were there at that time?

A. I was.

Q. And you were there most of the time that he was Secretary-Treasurer of the Company?

A. Well, I can say that I was there; I lived there and my business called me out on various trips, I was back again immediately, and I was in Tonopah mostly all the time.

Q. Now, is it not true, Mr. Lynch, that during the time Mr. Dunlap was Secretary-Treasurer of the Company that you and he and Mr. McQuillan were practically the only local directors of the Company that were there?

A. Well, that was during part of the time, but during Mr. Alexander's—when he was director, he was a **[179]** director and then he resigned and became Secretary and Treasurer and not a director, and then afterwards became a director again; during the time that he was a director, we were, yes, sir.

Q. Mr. Knox was the President of the Company, Mr. Knox who is present here in court?

A. Yes, sir.

Q. And he was only there a small portion of the time, was he not?

A. Well, in the beginning he was there a great deal of the time; Mr. Knox made periodical visits, I should say if they were averaged all up, he would be

(Testimony of Thomas J. Lynch.)

easily there once every six weeks.

Q. And for how long?

A. He would stay sometimes a day, sometimes ten days, and I have known him to stay there a month.

Q. Is it or is it not correct, Mr. Lynch, that in the main Mr. Knox, as the chief executive of the Company, and paying particular attention to the management of its fiscal affairs, was absent in the east upon that business?

A. Well, he was absent in the east, of course, but he was always in direct touch with the Company, even in his absence, by wire.

Q. By wire? A. Yes, sir.

Q. Well, I speak about his physical presence?

A. He was away from there, yes, sir.

Q. Now, is it or is it not true, that during that time, on many occasions, matters arose of an emergency nature which Mr. Dunlap, with the knowledge of the directors, and with their acquiescence, discharged, duties outside of the office of Secretary and Treasurer for the Company?

A. Not to my knowledge, outside of his scope as director and Vice-President.

Q. I presume when you speak as not being outside of his scope, you mean what in your judgment he did, he ought to have done by [180] reason of holding the office of Secretary and Treasurer, is that what you mean?

A. Yes, sir, that is what I mean.

Q. Matters like appearing before the Board of Equalization, interviewing claimants against the

(Testimony of Thomas J. Lynch.)

Company for damages, and endeavoring to adjust them; proceeding to obtain patents for land; if such acts were done, in your judgment, they pertained to the office he held?

A. I do, I think that, yes, sir, in my judgment.

Q. You think those all should have been done by reason of being Secretary and Treasurer?

A. Yes, sir, and also as director and Vice-President subsequently.

Q. And it is with that view in your mind that you wish your testimony to be understood which you have given?

A. If you will let me state the reason why in my judgment I think so.

Q. Well, if you have answered the question, make any explanation you wish.

A. I think, Mr. Summerfield, I can explain why I think so.

Q. All right.

A. Because in all my connection in Tonopah, in all my time in Tonopah, I have been connected with corporations, several; and I have performed just those same duties, patenting claims, settling accidents, discharging all that line of duties, and I never received a cent for that, and never expected to, for years; that is the reason in my judgment I don't think they are of value.

Q. And it is upon that basis, then, that you think that he should have done that character of work, if he did do such, without compensation other than his salary, when he was Secretary and Treasurer, and

(Testimony of Thomas J. Lynch.)
without any compensation when he was Vice-President and Director?

A. Yes, he should have done it for the interest [181] that he had in the stock, the profits that he would make out of the stock; that was the consideration under which I did it.

Q. Well, are you basing your testimony in that respect principally upon the reason that you have done work of that kind for which you did not get any compensation?

A. Yes, and others the same way there.

Q. Now, I understood you to testify, Mr. Lynch, that basing your answer upon your knowledge of the course and management of the mining corporations at Tonopah and in that vicinity, that in your opinion services for which Mr. Dunlap is seeking to recover in this action were without value?

A. Yes, outside of his scope, outside of the duties that were required of him.

Q. When did you first, if you know, reach that conclusion? A. When did I first reach it?

Q. Yes.

A. After I had gone into the matter very carefully.

Q. Well, when did you first consider the matter carefully?

A. I considered the matter carefully in all its details at the time of the meeting, the 15th, when Mr. Dunlap put in his claim for salary.

Q. Did you have a conversation with Mr. Dunlap, early in February, 1910, on the corner of the street near Epstein's office, with reference to his claim

(Testimony of Thomas J. Lynch.)

against the Company for these services?

A. No, sir.

Q. You did not have any?

A. I did not have any on the corner of the street.

Q. Well, where was it, then?

A. Mr. Dunlap came into Epstein's office, and asked me to come over into his office, and we went over into his office and he told me—there is where we had a conversation in his office. **[182]**

Q. Did you at that time tell Mr. Dunlap that you knew his services to be meritorious, that he should be paid for the same, and at the next meeting you would introduce and advocate a resolution that he be paid for them? A. I did not.

Q. You did not tell him that?

A. No, sir, I did not.

Q. Did you tell him anything of that kind, in substance and effect, Mr. Lynch?

A. I told him this: Mr. Dunlap went through all his services to the Company, how he had settled all the accidents, saved the Company from many lawsuits, and how he had perfected the claims against a lot of adverse, against people who were probably adverse to the patents, and how he had saved the Company from every individual lawsuit; and he told me that if the Sherman case had been left in his hands the Company would not now have a case of $42,500 against it. After he had told me all those things, I said to him, "Well, have you talked to Mr. Knox about the matter?" And he said, "No, I have not, because I think he will oppose it." I said,

(Testimony of Thomas J. Lynch.)

"How does Alex feel?" I meant Mr. Alexander. I said, "Have you asked him anything about it?" "Why," he said, "yes, I did, and Mr. Alexander did not express any opinion in regard to the matter." "Well," I said, "Mr. Dunlap, do you want me to present this to the Board of Directors?" and he said, "I wish you would," and I said, "I shall do it," and he said, "I think that in view of these things I should have a salary from now on of $300 a month, and in case they don't care to pay me $300 a month in the future and retain my services, if they would consider a lump sum of $5,000, I should accept it." And I said, "Now, do you want me to present that?" and we left with the understanding that I should present that—I don't know as I understood as a motion, but I was to make that talk to the Board of **[183]** Directors, after this understanding that we had in his office. Do you wish me to proceed?

Q. Yes, if there is anything further.

A. Well, after we had ended that interview, it was some time later, I forget now when, but the day before this meeting, we had two meetings on that day, and adjourned.

Q. Do you mean the 14th or 15th?

A. Well, say the 14th, this was the 14th, we had the first meeting, and then we adjourned to the following day. I told Mr. Dunlap, we walked up together, and he said, "I think that I shall present that, make the first talk, present that motion." "Well," I said, "I think you had better, too," and he did so; and I made a talk that the Company should

(Testimony of Thomas J. Lynch.)

give him $5,000, and Mr. Knox and Mr. Alexander opposed it; then we asked Mr. Dunlap to retire; then is when we went into the thing in detail. The opinion that I had had on the subject was from Mr. Dunlap, and his side of the case altogether, because I had not looked into the past services in the settling of those things; they were settled, as I understand, and the Board of Directors did not look into them in any detail, and the information that I got on all those things was from Mr. Dunlap, and I believed what he said, but after I had heard the other side of the thing, I changed my opinion in regard to the value of those particular services; and that was the reason that I changed my mind.

Q. Now, Mr. Lynch, is it not true that you, as a local director and being there practically all the time, personally, knew more about what Mr. Dunlap had done with reference to those services than the other gentlemen who were present there and who opposed it? A. No, I did not; I did not know as much.

[184]

Q. Why, you had gone with Mr. Dunlap on some occasions?

A. Only one; I never went on any occasions, it was only up at this Mitchell house.

Q. You knew of the Merton matter, didn't you?

A. Why, I was called on the jury, to act as a juryman on the coroner's jury.

Q. You heard all about the case?

A. No, I was excused.

Q. You were present, were you not, at the hearing?

(Testimony of Thomas J. Lynch.)

A. No, I did not hear it, I did not stay, I left immediately, I saw the body at the morgue.

Q. Don't you know anything about what Mr. Dunlap did about it? A. No, I do not.

Q. You don't know anything about it? A. No.

Q. You don't know whether he did do anything or whether he did not do anything?

A. I saw him there.

Q. I say you don't know?

A. Of my own knowledge, I do not.

Q. With reference to Ursin and Smeigh?

A. I don't know anything about that; the information I got of those cases was from Mr. Dunlap.

Q. You don't know anything personally about it?

A. I never inquired into them; no, sir, I do not.

Q. Do you know anything personally about any of those accident cases, except the Mitchell case?

A. Well, personally, no; but I know they occurred, and I knew that they were settled, but as far as going into the detail of the matter, how they were settled, or by whom, I don't know; Mr. Dunlap told me he settled them.

Q. You don't know whether he did or whether he did not?

A. I don't know, I thought he did; he told me he did; Mr. Alexander and Mr. Knox—when we went into the detail, I found that [185] he didn't do it at all.

Q. You found that he did not from the information presented to you by Mr. Alexander and Mr. Knox? A. And Mr. Collins, yes, sir.

(Testimony of Thomas J. Lynch.)

Q. And Mr. Collins, the gentleman who is superintendent of the mine, and who last testified on the witness-stand? A. Yes, sir.

Q. Now, you say that the conversation between you and Mr. Dunlap before this meeting, that Mr. Dunlap did explain to you in detail about what he claimed he had done?

A. Yes, he did; I don't say that he went into each individual case, in all its details, Mr. Summerfield.

Q. Well, I don't mean all the details; he explained in a general way about what he based his claim against the Company on, didn't he? A. Yes, sir.

Q. Now, I believe you said that you did make a motion at the directors' meeting that he be paid $5,000? A. I did not make a motion, no.

Q. Well, you advocated that, did you?

A. Well, Mr. Dunlap made the motion, and I recited these various things, along the line of the conversations we had had together.

Q. Now, between the time that you had that meeting with Mr. Dunlap and the time of that meeting up there, hadn't you endeavored to inform yourself about what the facts were, you being a local director of the Company, knowing that the matter would come up at the directors' meeting? A. No, I did not.

Q. You did not pay any attention to that at all?

A. No, I thought it was all just exactly as Mr. Dunlap stated, that he had done it all.

Q. You simply acted upon the basis that he had told you the truth about it?

A. Yes, I believed what he said; I believed that

(Testimony of Thomas J. Lynch.)
he really had [186] done just exactly what he said he had.

Q. Are you positive now at that meeting, Mr. Lynch, that Mr. Dunlap made any motion whatever that he be paid any sum of money whatever?

A. Do you mean whether it was in regard to a formal motion or not?

Q. Any kind of motion or resolution; did he move that he be paid anything, or offer any resolution that he be paid anything?

A. Well, a formal motion, we were not in the habit of making a formal motion until the matter was ready absolutely to be voted on and we had all settled which way we were going to vote.

Q. You attended most of the meetings, didn't you? You were not accustomed to get ready to vote on anything before a motion was made, were you?

A. No; but, Mr. Summerfield, we discussed everything in particular; Mr. Dunlap told all of his services, and one thing and another, to the Company, and wanted compensation ; it was right up to the motion; I would not swear that he made an absolute formal motion on the matter, it was right up to it, though.

Q. I pass to you for your inspection, Mr. Lynch, Defendant's Exhibit "B," which I wish you would glance over. Unless you wish to do so, I do not care to have you examine it critically, but I pass it to you more for the purpose of asking you if you remember that? A. Yes, I do.

Q. When did you first see it?

(Testimony of Thomas J. Lynch.)

A. I saw it in the meeting following this one we are speaking of right now, on the 15th.

Q. On the 14th or 15th? A. On the 15th.

Q. Do you remember whether or not that was read and considered before you advocated that the Company pay Mr. Dunlap $5,000 for his services?

A. It was read the next day. **[187]**

Q. Wasn't it presented the day before and a day taken for you to consider it? A. No, sir.

Q. Was it read before you advocated the payment of $5,000 to Mr. Dunlap? A. No, sir.

Q. Was it read at all?

A. It was read the following day.

Q. When was it that you advocated that?

A. Why, the first day we met, as I have been explaining to you, Mr. Summerfield; we met the first day, and Mr. Dunlap presented this statement.

Q. The first day?

A. The first day; then I came and corroborated that statement; that is, I spoke in support of it; then Mr. Knox said that the proposition of compensation on the services which he outlined in his statement was so vague that it was impossible for this Board to do anything, in his estimation; that is after Mr. Dunlap had retired; he retired immediately after I had made my statement, or shortly after that, Mr. Knox asked him if it would be embarrassing for him to be there while we were discussing his affairs, and he retired; then he came back again and Mr. Knox made this statement about the generalities of it, and wanted some specifications, something specific on

(Testimony of Thomas J. Lynch.)

which to base a voucher; Mr. Dunlap retired shortly after that, we adjourned, and the next day he came forward with that brief, as it has been known in the Company since, as the specific things which he did that would entitle him to compensation from the Company. That is my understanding of the whole transaction.

Q. Was there anything that you recollect in this so-called brief, Mr. Lynch, that Mr. Dunlap had not told you before in that conversation?

A. Well, I have not read it all, and I cannot say off-hand. [188]

Q. Well, you simply don't remember about it?

Q. What is that?

Q. You simply don't remember about it. Of course I presume all that Mr. Dunlap did state in that conversation with you, you do not remember, and you don't remember all that is contained in the brief?

A. Certainly not in detail, unless I would give some time to it.

Q. Do you remember whether or not at that conversation had between you and Mr. Dunlap early in February, in Mr. Dunlap's office, you told him that he was entitled to compensation for those services; and that you had done similar services yourself and had not been paid for them, and you were a fool for not getting paid?

A. I don't remember I ever said that.

Q. When did you make an examination about this tax matter?

(Testimony of Thomas J. Lynch.)

A. Why about Monday, I think, last Monday.

Q. Last Monday? A. Yes, sir.

Q. You made an examination of that, I presume, for the purpose of being accurate in your testimony in this case, did you not?

A. No, I made the examination to assist—I went up with Mr. McQuillan, Mr. McQuillan wanted to refresh his memory on the minutes of the Commissioner's proceedings, and I accompanied him.

Q. Now, is not the amount of the original assessed valuation of that Company shown by the records in the Montana-Tonopah Company's office?

A. The original?

Q. The original valuation of that property?

A. Of all the property?

Q. Yes. A. No.

Q. You don't think it is?

A. Not the tax; the statement of the taxes from the Assessor. **[189]**

Q. As a director did you hear the minutes of the Montana-Tonopah Company for February 15th, 1910, read at a subsequent meeting after that?

A. I don't remember; what are they?

Q. You don't remember whether you did or not?

A. I probably would if I heard the minutes.

Q. Can you explain, Mr. Lynch, what you claim to be an error in there, being a saving of $2,587.50, effected by reason of a reduction of assessment?

A. Can I explain it?

Q. Yes.

A. Because I took Mr. Dunlap's statement abso-

(Testimony of Thomas J. Lynch.)

lutely for everything that he said, I thought it was all right; it did not occur for a minute to any of the directors to question anything that he said.

Q. Don't you know, Mr. Lynch, that the charge for those taxes was on the records, on the Company's books before the Board of Equalization acted on the matter at all?

A. No, it was not on the books, it was not on the tax statement.

Q. Do you know what the assessed valuation of that property was?

A. I know from the treasurer's books, in the assessor's handwriting.

Q. What was it, if you know?

A. According to the books—the mill, mind you, I am speaking of the mill, now—the balance of the surface improvements—for the year 1907, Mr. Summerfield, are you talking about?

Q. Yes.

A. For the surface improvements, I can read you this, I had the treasurer take this off.

Q. All right, read them.

A. (Reading from paper.) $850; $175; $4,025; $325; $200; $200; $800; $105; $20; $150; $2,000; $750; $825; that is the surface improvements, and so forth. Now, shall I read the balance of it? **[190]**

Q. All right.

A. The mill—this is the statement of the taxes on which the tax was paid—then the next item according to the treasury books is $58,333 for the mill. There is a red line drawn through that on his books, and the

(Testimony of Thomas J. Lynch.)

sum $25,000 substituted for the $58,333. Mrs. Gilbert, the deputy treasurer, informed Mr. McQuillan and myself that was the assessment for that year for the Montana-Tonopah Company mill. The next item is $1,412.60, mining claims. I presume that was the tax on the patented mining claim, which made the total assessment as shown by the Montana voucher, $36,837.60. Do you want to see this? (Referring to paper.)

Q. No. Now, Mr. Lynch, is it or is it not true that the assessed valuation for the year 1907 of all the property of this defendant Company was $100,000?

A. Not according to the Treasurer's books.

Q. I mean of the mill?

A. Not according to the books of the Nye County treasurer.

Q. Is it or is it not true that after a presentation made to that Board of Equalization by Mr. Dunlap, that it was reduced from $100,000 to $25,000?

A. Not according to the Board of Equalization minutes.

Q. Well, do you know anything about it personally?

A. Why, just the information that everybody gets; the treasurer told me absolutely, and the county clerk who told Mr. McQuillan and myself, who was the secretary of the Board of County Commissioners, and it appears on their minutes that the reduction there is an error by the Board of County Commissioners; we found a discrepancy in the report for

(Testimony of Thomas J. Lynch.)

1907, the tax of the Montana-Tonopah, according to their minutes, it reads $23,333, reduced; now Mr. [191] McQuillan agreed that that was a mistake, that it should have been thirty-three, and then when we took it into the treasurer's office it tallied with exactly what we get, thirty-three thousand: it shows on the minutes what the Board of Equalization reduced the Montana mill.

Q. You made the examination for the first time last Monday, did you?

A. Mr. McQuillan and I, he wanted to refresh his memory, he got this list from Mr. Dunlap, and he wanted to corroborate it, and I went up with him.

Mr. SUMMERFIELD.—That is all.

Mr. THAYER.—The Articles of Incorporation of the defendant Company, which have just been marked for identification, are offered in evidence. It is a certified copy, certified by the Secretary of the State of Nevada.

Mr. SUMMERFIELD.—No objection.

(Articles of Incorporation admitted and marked Defendant's Exhibit "C.")

Mr. THAYER.—Before the next witness is called to the stand, I would like to read into the record Defendant's Exhibit "B," which has been admitted, and has been referred to in this examination of the last witness. (Reads:)

[Defendant's Exhibit "B."]

"Gentlemen:

Please permit me to read this and leave it with you for consideration:

In presenting this case I am handicapped by two conditions: First, it is impossible to itemize such services as I have been called on to render the Montana-Tonopah, without cheapening them, because the personal equation must, of necessity, enter so largely **[192]** into it. Secondly, because the case is my own, rather than that of another which would permit me to treat of the nature of the services and make a plea for their acceptance, but which cannot be done here.

It is the practice for corporations to pay their executive force for services. I have never known of a case wherein an itemized account was required of them. I venture the assertion that so long as Black Wallace, Ryan or Senator Nixon, were the local representatives of the S. P. in Nevada, they were never called on to furnish an itemized account of the services in order to complete the voucher record for the inspection of some stockholder. How it would have cheapened such service to have such an item as this appear in their report: 'To influencing John Doe of Lincoln County to vote to reduce the assessment per mile for 1905.' How humiliating to have some director say: 'But look at the advantage and prestige accruing to you because of your connection with the S. P.'

As stated before it is very difficult to itemize, with

proper recognition of the surrounding influences, such services as I have been called on to perform and which fell to my lot because of the fact that our President was a non-resident and therefore could not attend to them. Gentlemen, there is no egotism or self-adulation in quoting the statement made by Mr. Lynch yesterday 'Dunlap is regarded as the local head of the Montana' but it is a simple statement of fact, and as such, these duties came to me.

The only actions that can be reduced to mere figures are those which took place before the Board of Equalization. In 1907, our mill was listed at $100,000, which at the prevailing **[193]** rate 3.45 per $100.00 would have cost in taxes, $3,450.00; as the direct result of my presentation of the case, the amount was reduced to $25,000 on which we paid $862.50, thus effecting a saving on this one item of $2,587.50. The surface improvements were listed at $16,300.00, but were reduced to $10,425, on which the saving was $202.88. In the matter of the separate listing of the R. R. spur; this item was assessed at $2297.00, on which the taxes were $78.09, I succeeded in having this amount deducted from our general list, thus effecting the saving not only for the year, but for all time to come by having this precedent established.

In the matter of the death of John Mitchell: The settlement was effected for $1250.00 and a receipt in full obtained. This amount was, after a long and tedious correspondence, secured from the Insurance Co. thus reimbursing the Montana in full. It is impossible to show in figures the saving thus effected,

because the matter was closed right there and was not permitted to go any further. Had it been allowed to get into the courts, what kind of a verdict would have been rendered where $15,000.00 is allowed for ONE FINGER and $25,000.00 for a hand, it is impossible to say; but it is reasonable to believe that the amount of the verdict would have been limited only by the amount prayed for. In that case the $5,000.00 liability of the Insurance Co. would have been easily wiped out by the court costs, to say nothing of the attorneys' fees, and the verdict. So, gentlemen, it is very difficult to express in figures the value of such services as I have rendered, and I believe that such a demand, is very unusual and seldom if ever made.

I have always endeavored to be fair with the stockholders of the Montana-Tonopah, and I intend to be fair with them in this **[194]** instance. I have canvassed the matter over carefully and conscientiously, and I could look every stockholder in the eye and cast my vote for $5000.00, the amount proposed by Mr. Lynch yesterday.

The following is said without the desire, intention or thought of manufacturing any sentiment or feeling in my favor. When I advocated the giving of the 25,000 shares of treasury stock to Mr. Knox, for his services rendered the Company, I did it because I felt that he was entitled to it. Those services were worth it but he could not have itemized them without cheapening them. I could have gone before a stockholders' meeting and made a better plea for him than he could have made for himself, because

of the personal equation which would have entered into it. If it were left to me I would give them to him to-day, for the fact that these services are a thing of the past, does not reduce their value nor lessen the obligation of the Montana-Tonopah."

Mr. THAYER.—I would like the indulgence of the Court to ask Mr. Lynch one further question.

Q. Mr. Lynch, do you know what duties are generally performed by secretaries and treasurers and vice-presidents of corporations in the Tonopah Mining District?

Mr. SUMMERFIELD.—I object to the evidence sought to be elicited unless it first be shown that the by-laws of the Company, which I understand to be within the possession of the defendant Company at the present time, do not define those duties.

Mr. THAYER.—I would say, your Honor, that the by-laws were never adopted by this corporation until a year or a year and a half before bringing this action, and cover a very short time of the period of the corporation's existence.

(Argument.) [195]

The COURT.—If you have defined the duties for a year and a half of this time for which compensation is sought, it would seem to me that those by-laws ought to be introduced for that time; if they do not define the duties, then you can use other testimony; but if the by-laws define the duties of either of these officers for a year and a half or for two years, or for the whole time, it would seem to me, for the time they do cover, it is the best evidence as to what the duties

of the office are.

Mr. THAYER.—I agree with your Honor precisely as to the time they do cover. My question should refer, and I make it now to refer to the time prior to August 12th, 1907. (Q.) Do you know what were the duties which were usually performed by the secretaries and treasurers and vice-presidents of corporations, and directors of corporations, in the Tonopah Mining District?

A. Yes, I do.

The COURT.—Is there any proof here as to what the agreement was with Mr. Dunlap when he went into the office of Secretary and Treasurer?

Mr. THAYER.—There is no proof of that.

The COURT.—Was there any agreement when he was employed as to what his duties would be?

Mr. THAYER.—No proof of that.

The COURT.—Well, it would seem to me that it ought to be shown before the proof is elicited as to what the custom is, whether there was any contract as to what services he should perform; and until it is shown that there was no agreement it would seem to me proof as to what was done in other companies by the secretary and treasurer would not be admissible.

Mr. THAYER.—Very well, I will recall Mr. Lynch at some other time then. **[196]**

The COURT.—You can put on the testimony any time you like. But in the absence of proof to show that there is a record, or that there was an agreement or a rule of the company itself fixing the duties of those officers, it seems to me that to prove it by custom is simply adding confusion to the case.

[Testimony of Charles E. Knox, for Defendant.]

Mr. CHARLES E. KNOX, a witness called for the defendant, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. THAYER.)

Q. State your name, Mr. Knox.

A. Charles E. Knox.

Q. Where do you reside?

A. Berkeley, California.

Q. What is your connection with the Montana-Tonopah Mining Company, the defendant Company?

A. President and general manager.

Q. How long have you been President of that Company? A. Since its organization in 1902.

Q. What has been the nature of the duties which you have performed as President of the Company, or performed for the Company?

Q. Well, as President I presided at the stockholders' meetings, directors' meetings; I signed stock certificates, signed legal documents, or other documents, on the order of the Board in consummation of any deal or transfer of property, negotiations of loan.

Q. All duties which usually pertain to the executive head of a corporation? A. Yes, sir.

Q. Have you ever received any salary in connection with this corporation? A. Not as President.

Mr. SUMMERFIELD.—I object to the question on the ground the testimony sought to be elicited is irrelevant to any issue in this case. **[197]**

(Testimony of Charles E. Knox.)

The COURT.—It seems to me so at the present time.

Mr. THAYER.—I will endeavor to show the Court how it is entirely relevant. In the first place, the plaintiff has testified that Mr. Knox at one time received $5,000, a little of it was for expenses, but the major portion of it was for his salary to compensate him for services rendered in connection with the corporation. This testimony is elicited in the first place for the purpose of rebutting that. In the second place, if this plaintiff can recover as the Vice-President of a corporation for the services which he rendered in that capacity, he cannot, under any circumstances recover more than the President was paid by the corporation, or authorized to be paid by the corporation, or received from the corporation, for performing the same duties which the plaintiff performed as Vice-President, in the absence of the President from his duties.

The COURT.—With reference to the first point, I am inclined to allow you to ask the question, though, if my memory serves me right, the question was propounded by yourself on cross-examination, and the answer was gotten by you from Mr. Dunlap; it was immaterial, and the rule is when you draw out an immaterial matter on cross-examination, you will not be permitted on direct examination to rebut it in your testimony in chief. As to the other matter, the mere fact that you as President of a corporation render your services gratuitously, perhaps because you own a block of the stock, does not necessarily

(Testimony of Charles E. Knox.)

prevent the Vice-President, who perhaps owns one share of stock, from receiving compensation for services that he may render outside of his official duties as Vice-President.

(Argument.) **[198]**

Mr. SUMMERFIELD.—If the Court please, in order that the record may show clearly the status of this case, if the gentleman so desires, it may be entered of record as an admitted fact, that from the organization of the defendant Company until September 10th, 1907, there were no by-laws of this Company. I am so informed by Mr. Dunlap, and that being correct, it might as well be entered of record as being the truth.

The COURT.—That may be entered then, as an admitted fact in the case.

Mr. THAYER.—Did your Honor rule on the objection made? (Question read: Have you ever received any salary in connection with this corporation?)

Mr. SUMMERFIELD.—I objected on the ground it was irrelevant to any issue in this case. I now object to the evidence sought to be elicited upon the ground that it could have no bearing upon any testimony in this case, except upon testimony elicited by counsel himself on cross-examination, and that if that testimony was irresponsive to the question which he propounded, it devolved upon him to move to strike it out; if it was responsive, that he should not be allowed by other evidence to rebut responsive testimony which he has elicited.

(Testimony of Charles E. Knox.)

The COURT.—Well, that is the rule, if the objection is made on that ground, I will have to sustain it.

Mr. THAYER.—May I have the benefit of an exception, your Honor. And let the record show that the exception to the ruling is made on the ground that where the President of a corporation serves without salary, that the Vice-President is presumed, in the absence of affirmative proof to the contrary, in the way of a resolution of the Board of Directors, or a by-law, or the charter **[199]** of the corporation, to also serve without salary, while performing the duties of the President.

The COURT.—The exception may be noted. I will allow you to make any proof you want to as to the compensation as Vice-President, or for Mr. Dunlap; I am not shutting out any proof as to salary or lack of salary as to the Vice-President.

Q. Please go somewhat into detail, Mr. Knox, as to what duties you performed.

A. In executing contracts for the transportation and sale of ore, for smelting, for machinery for the mine and mill, for the settlement of damage suits.

Q. Will you state to the Court and jury how long you have known the plaintiff, Mr. Dunlap, in this case? A. I think about eighteen years.

Q. Where did you first know him, and how intimate has been that acquaintance?

A. I attended his wedding in Missouri, and met him at the time.

Q. Eighteen years ago?

A. About eighteen years ago, I think; he will re-

(Testimony of Charles E. Knox.)
member that perhaps better than I do.

Q. How often have you seen him since, up to the time that he came to Tonopah?

A. Before coming to Tonopah we lived in the same town for a year or more, I saw him quite frequently, twice or three times a week; I afterwards moved away and saw very little of him for several years until Tonopah was discovered, and on one of my trips to the East, I stopped in Kansas City and met Mr. Dunlap, and he asked me if there was an opening for a man in the West, and I told him yes; in fact, there was an opening for him in Tonopah with the Montana-Tonopah, **[200]** and I suggested that he join me on my return from the East, and go to Tonopah, which he did. After looking over the situation, he stated that he would like to become connected with the Company, and he accepted the position of Secretary and Treasurer of the Company at a salary of $150 a month.

Q. What were the duties of Secretary and Treasurer at that time?

A. To keep all of the records of the Company, to transfer all stock; the duties were not closely defined or restricted to any particular things outside of that.

Q. At the time he was employed by the corporation as Secretary and Treasurer, was there any agreement made with Mr. Dunlap as to the character of the duties he was to perform?

A. Nothing further than Secretary and Treasurer of the Company, and you might say on the assumption that he knew perfectly well—

(Testimony of Charles E. Knox.)

Mr. SUMMERFIELD.—Wait a moment. I object to the latter portion of the answer, and move that it be stricken out, commencing with the "assumption."

The COURT.—It may be stricken out.

Q. There was no agreement as to what duties he was to perform? A. No, sir.

Q. Did Mr. Dunlap while he occupied the position in that Company perform any greater or other duties than his predecessors or successors? A. No, sir.

Q. Did Mr. Dunlap have any conversation with you with reference to an increase of his compensation as Secretary and Treasurer? A. Yes, sir.

Q. On more than one occasion?

A. Yes, I think so; several occasions during his term as Secretary and Treasurer. **[201]**

Q. Will you relate those conversations to the best of your recollection?

A. Well, I can't recall any particular conversation, we were a small and growing concern, and expected the duties of Secretary and Treasurer to become heavier as the Company progressed, and that the salary would be increased as the duties became heavier.

Q. Were they increased? A. Yes.

Q. State the circumstances, the time and place and the conditions under which Mr. Dunlap last talked with you with reference to an increase in his compensation as Secretary and Treasurer of the Company.

A. That was immediately after the stockholders' meeting in Salt Lake in 1904; the new Board had been elected, seven of them were present, and the Board

(Testimony of Charles E. Knox.)

was congregated around the table in Judge Dixon's office ready to organize; after we were seated Mr. Dunlap stated that he wanted to see me; I stepped into the adjoining room and he said that he would not work any longer for $200 a month, that he wanted another hundred dollars. I said, "Well, the Board is just about to meet, and we can take it up at once." He says, "I don't want to put it up to the Board. I want to know from you, and I want to know now." My reply was, "Dick, I am opposed to an increase in the salary; it has been increased from $150 to $200; the Board has voted you the transfer fees, which average about $45 a month, and I object to that on general principles also, and so far as a hundred dollar increase is concerned, I am opposed to it, and, personally, I am ready to accept your resignation right now." My final remark was, "Go back into the meeting and vote as you please."

Q. What occurred at the meeting? **[202]**

A. Well, I was re-elected President and Mr. Ellis was elected Vice-President; at the time there was something of a division on the Board, and any one director held the balance of power.

Q. Was anything done in reference to an increase in the Secretary's compensation?

A. Well, after the Board was organized, and other matters discussed, in spite of the fact that Mr. Dunlap did not want it brought before the Board, I brought it up, and stated in bringing it up, although it was a little unusual for the chair to express itself, that I was

(Testimony of Charles E. Knox.)

opposed to the advance; the Vice-President, Mr. Ellis, stated that he was also opposed to increasing salaries at that particular time, and Mr. Dunlap asked us to stop the discussion, as it was not the proper time to discuss it, and the matter was dropped right there.

Q. You have been President of the Montana-Tonopah Mining Company since its organization, have you not? A. Yes, sir.

Q. Will you relate to the Court and jury what Mr. Dunlap did and also what you directed him to do with reference to securing patents on the Company's claims, and when this occurred?

A. Application had been made for the patents in the regular way through our attorneys, Dixon, Ellis & Ellis, and through Mr. Park, I think, the attorney consulted by Dixon, Ellis & Ellis for that particular purpose; the surveys had been made, we had gone through publication, and the receiver's receipt issued; I then took the underground maps and went to Washington, went to a patent attorney, Horace F. Clark, and engaged him to have our case made special; he took me to the Land Commissioner, and to the chief clerk in the Land Commissioner's office, and I made a statement to the Land Commissioner as to the large amount of development work and equipment that we expected to— **[203]**

Mr. SUMMERFIELD.—I object to the testimony, if the Court please, as being given, upon the ground it is utterly irresponsive to the question; the question was about what Mr. Dunlap did, not what the witness did.

(Testimony of Charles E. Knox.)

Mr. THAYER.—I assume it is leading up, your Honor.

The COURT.—Well, you had better answer the question that is asked; simply state what Mr. Dunlap did with reference to the securing of patents, and what you directed him to do.

A. I advised Mr. Dunlap that I had employed Mr. Clark to handle the patent matter in Washington, and that he had succeeded in having the case made special, and anything that he wanted done for Mr. Dunlap to see that it was done very promptly, without any loss of time.

Q. State whether or not Mr. Dunlap was the appointed attorney in fact of the corporation to secure patents and sign papers in connection therewith.

Mr. SUMMERFIELD.—Object to the question on the ground any answer responsive to the same would involve and be only the conclusion of the witness as to what constitutes an attorney in fact, and not calling for what he did.

The COURT.—It seems to me that objection is good; and if he was appointed attorney in fact, there should be a record of it.

Q. Do you know what Mr. Dunlap did in and about securing the patents? A. I do.

Q. Will you relate it, please?

A. He made a trip to Reno, to the Surveyor General's office, in order to expedite matters, I don't know just what he did do there; he also made a trip to Belmont, at that time the county seat of Nye county, to

(Testimony of Charles E. Knox.)

perfect or to study the records or something, in regard to the titles; I don't know what the technical work was. **[204]**

Q. All of this time he was drawing a salary as Secretary of the Company, was he not?

A. Yes, and his expenses being paid by the Company.

Q. When did the Company first begin to plan for the construction of a mill? A. In 1906.

Q. Who prepared the plans and specifications for the mill? A. Mr. F. L. Boski.

Q. Who was general manager of the Company when the plans and specifications were completed?

A. Mr. Mark B. Kyle.

Q. They were not completed or in the hands of the Company while Mr. Gillis was general manager?

A. No, sir, there were no steps taken in that direction during Mr. Gillis' administration.

Q. Who succeeded Mr. Gillis?

A. Mr. John A. Kirby of Salt Lake.

Q. And who succeeded Mr. Kirby as general manager? A. Mr. Kyle.

Q. There have been testified to by various witnesses the settlement of claims for personal injuries by the Company; I will ask you, Mr. Knox, to relate what if anything you did in the settlement of the Swope case, as it has been referred to?

The COURT.—I will change my ruling on the record that you sought to offer from the minute-book, and so much of the resolution as shows that Mr. Knox

(Testimony of Charles E. Knox.)

was appointed to settle that claim will be admitted; the balance of it, I think, is a recital of fact, discussing the nature of the claim, and that part of it will be excluded.

Mr. THAYER.—I will then read into the record that portion of the minutes of the Board of Directors meeting, dated January 6th, 1908, reading as follows, and from page 84 of the minute-book: **[205]** "Be it further resolved, that as an act of liberality, Mr. Charles E. Knox, as President of said Montana-Tonopah Mining Company, be and hereby is authorized to open negotiations with said Thomas H. Swope looking to the payment of the account of Dr. C. L. Hammond, amounting in total to $500 for surgical services rendered, provided said Swope will sign a relinquishment of any and all claims of whatsoever nature against said Montana-Tonopah Mining Company."

Q. Will you state, Mr. Knox, what if anything, you did with reference to the settlement of the Swope claim?

A. I agreed upon the settlement of the Swope claim with Mr. John G. Paxton, Mr. Swope and Mr. Moss Hunton, a relative of Mr. Swope, in the office of the Crissman-Sawyer Banking Company in Independence, Missouri; and the resolution just read embodies the terms of the settlement.

Q. Will you give some of the details about it, what you did?

A. Mr. Paxton asked for $7,500; after explaining in detail the manner in which the accident occurred,

(Testimony of Charles E. Knox.)

he seemed satisfied that we were not in any way responsible, but I told Mr. Paxton that we were willing to meet with Mr. Swope just as though he were not the son of a rich woman, and would pay the expenses just as we would in case he were not a wealthy boy, and that that sum would be the amount of Doctor Hammond's bill; he agreed to that, and I gave that instruction to the Secretary to remit the amount of the Hammond bill to Mr. Paxton; in the meantime the Secretary had succeeded in getting Doctor Hammond to reduce his bill, and he remitted the amount of the bill as reduced, $375; Mr. Paxton demurred, thinking that we should not take advantage of the reduction in the bill, that the whole five hundred should be remitted; and I instructed **[206]** Mr. Alexander to remit the other $125, which was done, and we got Mr. Swope's receipt.

Q. Did you get his relinquishment in accordance with the resolution? A. Yes, sir.

Q. What, if anything, did Mr. Dunlap have to do with the settlement of that claim?

A. Of negotiations with Mr. Swope himself, I know nothing about what was said or done in Tonopah; I know that up to the time that Mr. Swope left Tonopah he positively refused to state what he thought he was entitled to, and not until his attorney stated that he ought to have $7,500 was any amount fixed, and the argument began at that time.

Q. How did you keep in touch with the Company while you were away, Mr. Knox?

(Testimony of Charles E. Knox.)

A. I received daily, and weekly and monthly reports, and frequent letters from the superintendent and Secretary and Treasurer.

Q. How much of the time since you have been President of the corporation have you been at the Company's property at Tonopah?

A. I think about a third of the time; not less than a third of the time.

Q. State whether or not when you have been absent from Tonopah you have been engaged in the business of the Company; under what circumstances, where, and what business?

A. At times on the business of the Company in San Francisco, in dealing with the Smelting Company; in Philadelphia, with the owners of the adjoining properties to the Montana-Tonopah, the Belmont and the Tonopah, and as their officers are in Philadelphia a great deal of the transactions had with them have to be carried on in Philadelphia at the home office. [207]

Q. How much time away from Tonopah have you spent in the matters of this Company?

A. I should say nearly, if not quite as much away, as in Tonopah.

Q. You may proceed to the Ursin and Smeigh claim for damages; what did you do in connection with the settlement of those claims?

A. I received a letter from the superintendent, Mr. Collins, stating that he had heard from Mr. Gibbons, an attorney, in regard to the matter, and that he

(Testimony of Charles E. Knox.)

wanted an interview in the matter as soon as possible; on my next visit to Tonopah we had an interview; if I remember rightly, it was in the club-house of the Company, with the two men, but not with Mr. Gibbons; no agreement was arrived at at that time.

Q. Who was present at that interview?

A. Why, Ursin, Smeigh, Collins and perhaps Mr. Dunlap; I cannot recall whether Mr. Alexander was there or not.

Q. Will you continue?

A. Mr. Collins again wrote me a letter, caught me on my way East, it was addressed to me at Independence, Missouri, advising me or going into detail as to how the accident occurred, and discussing our position in the matter; I replied that I would consult with our eastern directors in regard to the matter, which I did when I arrived in Philadelphia, and advised Mr. Collins by letter that it was a case that we would settle as soon as I could return to Tonopah. Upon my return to Tonopah Mr. Collins notified Mr. Gibbons and arranged for a meeting in Mr. Gibbons' office with Smeigh and Ursin, and I asked the boys what they wanted, and my recollection is that Smeigh asked for six months' wages; Ursin asked for $2,400; when I asked Ursin what he wanted his reply was, it was fixed in my memory by Ursin's reply; he says: "Mr. President, I [208] am only twenty-four years old; I have a long time to live with one arm." It struck me as being a very strange appeal, and a very strong one. I then asked him if he wanted to get a lump

sum and go to some other part of the country, or whether or not he would like the idea of staying in Tonopah as a watchman on the Montana-Tonopah; he intimated that he would like the job. I then made a definite proposition—no, I am a little ahead, when he asked for $2,400, I told him I thought $1,800 was enough; after discussing the position, the job matter, I made him this proposition, that I would deduct six months wages from the $1,800, give him the balance in cash, and a position as watchman on the mine as long as we were in control of the property, meaning the present management; and with Smeigh, we gave him six months wages, $720, and he left the camp. Ursin accepted the proposition. We paid him $1,080, and gave him the position of watchman, which he has filled until a few months ago, when he went on a vacation to Oregon.

Q. What, if anything, did Mr. Dunlap have to do with the settlement of those claims?

A. Nothing during my presence in camp; I don't know what conversations he had with these men.

Q. But the settlement was made under the circumstances you have related?

A. Yes, sir, and I never heard of the $15,000 claim that Mr. Dunlap mentioned in this testimony the other day until he made the statement.

Q. What do you know, if anything, about the Mitchell accident? A. I know very little.

Q. Do you know anything of your own knowledge of that, Mr. Knox?

(Testimony of Charles E. Knox.)

A. Well, I knew that Mr. Dunlap was negotiating; of course I knew that the accident occurred, I don't remember whether I was in camp at the time or not; I was a few days later, if not at the [209] time; and we had in our employ at the time an ore sorter, named Jimmie Weeks, who was a very close friend of the Mitchell family, and I have always been under the impression that it was through Mr. Weeks' influence that the widow was willing to settle, more than the influence of any other person; he was close to the family and had been hurt and had a case in court for many years, and he advised her to settle.

Q. Will you relate what other claims for damages that have been settled you participated in the settlement of?

A. Well, I did not participate in the Tony Bosso case, excepting to approve Mr. Collins' idea of the settlement. I did participate in the settlement of the A. H. Brown case, where a carpenter was seriously injured.

Q. What did you do in connection with that?

A. Well, I discussed the matter with Mr. Brown, and agreed with him upon the terms of settlement.

Q. Did Mr. Dunlap participate in that settlement?

A. Mr. Dunlap was not in camp at that time. No, he did not participate.

Q. Did he participate in the settlement of the Bosso claim? A. No.

Q. Do you know anything of the Merton claim for damages, of your own knowledge? A. No.

(Testimony of Charles E. Knox.)

Q. Or of the Burns claim?

A. Yes, of the Burns claim; Mr. Collins consulted with me in regard to the employment of a physician on our own account, and that payment should be made to that physician.

Q. Do you know whether Mr. Dunlap participated at all in the settlement of that claim? **[210]**

A. He did not, I am under the impression that he was out of camp at that time also.

Q. During the time at which the most of these accidents occurred the Company was carrying employers' liability, was it not? A. Yes.

Q. Why did you settle these claims rather than to turn the settlement over to the corporation, to the insurance company?

A. Because we believe in dealing with our employees from the humane standpoint rather than from the legal standpoint.

Q. Do you remember a meeting of the Board of Directors some time in the fall of 1907, at which there was discussed a difference between the Board of County Commissioners and the defendant corporation with reference to taxes?

A. I remember a discussion of the subject, as to whether it was in a Board meeting or not, I cannot be positive.

Q. Will you relate what was said and done at that time?

A. Well, that the levy was a high one, that it was made on the assumption that we had been operating

(Testimony of Charles E. Knox.)

the mill, and getting the benefit of the mill for a full year; but, as a matter of fact, we had only operated the last three months of the year, and felt that it should not be charged up for a longer time than the mill had been in operation; and that was the unanimous opinion of all the directors in Tonopah at the time, Mr. Dunlap, Mr. Lynch, Mr. Alexander, Mr. McQuillan and myself; and the instruction was to the secretary to write a letter to the Board of Commissioners about the overcharge, and ask for a reduction; Mr. Dunlap was present, and said, "I am going before the Commissioners on next Tuesday, and I will take it up," and I said, "All right."

Q. You don't know of your own knowledge, what was done before the Board of Commissioners? **[211]**

A. No, I know there was a reduction in tax.

Q. Were you and Mr. Dunlap at any time partners?

A. We were partners in only one transaction that I can recall, and that was not a partnership affair; we have owned stock in the same companies many times, but we were partners in only one transaction: that was in the purchase of a portion of Jim Butler's interest in the—

Q. I don't think it is necessary to go into details, Mr. Knox. Will you state when, if at any time, and under what circumstances Mr. Dunlap ever talked with you with reference to receiving compensation for the services which he rendered subsequent to his retirement as Secretary and Treasurer of the Mon-

(Testimony of Charles E. Knox.)

tana-Tonopah Company?

A. I cannot recall a definite conversation or expression on that subject after Mr. Dunlap's resignation took effect in February, 1905.

Q. Do you know whether or not you ever had any conversation with him about it?

A. Prior to 1905; yes, sir.

Q. Well, I mean after his resignation as Secretary and Treasurer?

A. No, I cannot recall any conversation about it.

Q. Did you know that he expected compensation for the services which he was rendering at the time?

A. No, I did not.

Q. When did you first learn that he expected compensation for such services?

A. February 14th, 1910.

Q. You know of the services which Mr. Dunlap was rendering the Company, what he was doing as Secretary and Treasurer, and as director and Vice-President of the Company?

A. Yes, I was thoroughly familiar with everything that affected the Company.

Q. State whether or not you are familiar with the value of the services which he rendered the Company. A. Yes. **[212]**

Q. What, in your opinion, is the value of the services which Mr. Dunlap has rendered to the Montana-Tonopah Mining Company since his resignation as Secretary and Treasurer?

A. I don't think they have any value.

(Testimony of Charles E. Knox.)

Q. State whether or not the same duties would have been performed and the same results effected, without any interference by him.

Mr. SUMMERFIELD.—We object, if the Court please, upon the ground that any answer responsive to the question would be immaterial and irrelevant to any issue in the case.

The COURT.—It seems to me so; the question is altogether too general. It might be that the same result could have been obtained with the use of other agents.

Q. Did the corporation have other officers, employees and agents appointed to do the very things which Mr. Dunlap performed? A. Yes, sir.

Q. It did? A. It did.

Q. So far as you know, as the executive head of this corporation, was Mr. Dunlap ever requested to do anything for the corporation from the time that he resigned as Secretary and Treasurer, outside of the duties of a Vice-President and director?

A. No, unless Mr. Dunlap's statement that he would go before the Commissioners, for instance, unless an acquiescence to that would be an instruction; I would not so consider it.

Q. The plan was to have the Secretary write a letter to the Board?

A. Yes, sir; we had men for that purpose.

Q. When did you arrive in Tonopah prior to the February meeting of 1910?

A. If my memory serves me correctly, I arrived on Friday, and the meeting was Monday.

(Testimony of Charles E. Knox.)

Q. Did Mr. Dunlap talk with you at all with reference to compensation **[213]** for services, after you arrived and prior to the meeting? A. No, sir.

Q. Where did you stay in Tonopah at that time?

A. I stayed at the Montana Club, on the hill.

Q. What was the Montana Club?

A. Well, that is a residence maintained for the benefit of the employees of the Company, particularly the millmen, and from ten to twelve of the young mill men live there; we have rooms provided for them, and have a cook there; it is a regular club, at a *pro rata* of expense for the maintenance of the club, and a small rental for the rooms.

Q. Did Mr. Dunlap live there? A. Yes.

Q. How long did he live there?

A. He lived there from early in 1906.

Q. What were the circumstances under which he came there to live?

A. Well, I was in the east, and upon my return I found Mr. Dunlap installed in the room adjoining mine in the club-house, with a door between, and my closet full of his clothes.

Q. Was he invited to come up there by the Company? A. No, sir.

Q. Was he requested to leave? A. No, sir.

Q. Did the officers and directors of the Company when they came there usually stay at the club?

Objected to as immaterial.

Q. How many directors of the corporation live outside of Tonopah? A. Six.

Q. And you had no conversation with Mr. Dunlap

(Testimony of Charles E. Knox.)

prior to the meeting, with reference to compensation, the meeting of February 15th, 1910?

A. No, sir.

Q. Did you ever know, or expect, or intend that he was to receive compensation from the Company for his services? **[214]**

A. There was never an intention to make either of the Vice-Presidents salaried officers.

Mr. SUMMERFIELD.—I move to strike out the answer as being entirely irresponsive to the question propounded.

Mr. THAYER.—The motion can be granted without objection on my part; I think it is irresponsive.

A. No, is the answer.

Q. Did you at any time in January or February of 1908, or did you not, have any conversation with the plaintiff, in which you said to him, in substance, I propose to see that your services are properly compensated for?

A. I recall no such conversation.

Q. At the meeting of February 15th, 1910, Mr. Dunlap presented a statement of his claim against the Company, and thereafter a resolution was adopted, a portion of which has been introduced in evidence; do you know who prepared that resolution? A. The Secretary prepared it.

Q. Did you know of its preparation before it was adopted at the meeting?

A. I knew of it while it was being prepared.

Q. Did the Secretary write it out, did you see it before it was adopted?

(Testimony of Charles E. Knox.)

A. Well, he doubtless read it, I don't know that I looked at the manuscript.

Q. Do you know from what the figures in the statement were taken?

A. They were taken from Mr. Dunlap's brief, without question.

Q. Had you at that time made any investigation to see whether or not the figures in Mr. Dunlap's statement were correct?

A. I had not; I accepted the figures without question.

Q. Do you know who prepared the by-laws of the corporation, Mr. Knox?

A. A committee was appointed at a stockholders' meeting, and a committee was appointed by the Board, composed of Mr. **[215]** Dunlap, Mr. McQuillan and Mr. Lynch; our attorney furnished them with a copy of the by-laws of the Cienfuegos Copper Company, and they were adopted almost *in toto*.

Q. They were adopted as a form of the Cienfuegos Copper Company? A. Yes.

Q. And they were adopted without any change, practically from the by-laws of that Company?

A. There were probably a few little changes to fit the peculiar conditions of the Montana.

Cross-examination.

Q. (Mr. SUMMERFIELD.) There was no contract or agreement with Mr. Dunlap about what duties he should perform as Secretary and Treasurer, was there, Mr. Knox? A. No, sir.

(Testimony of Charles E. Knox.)

Q. Were there any instructions issued to him directly of what his duties should be, to your knowledge?

A. No, unless particular instructions were given by the Board after his employment.

Q. Unless there were such instructions?

A. Yes, unless there were.

Q. And whether they were or were not given by the Board, you don't know?

A. Well, they doubtless were from time to time; I have not been through the minutes to see.

Q. Well, if there were such, they were contained in the minutes of the Company, are they?

A. In most instances, yes, sir.

Q. When you were at Tonopah, would you examine the minutes of the Company for the purpose of ascertaining whether a correct record of its transactions was being kept?

A. I did frequently, yes, sir. **[216]**

Q. You did frequently? A. Yes, sir.

Q. Now, do you recall any meeting in which there were any instructions given whatever to Mr. Dunlap by the directors? A. No.

Q. At the time Mr. Dunlap went there for $150 a month, I understand that the Company was a struggling concern, endeavoring to develop its properties; that is correct, is it?

A. It was not struggling very hard; it looked pretty good in the face when he came.

Q. I understood you to use the term, "struggling"?

(Testimony of Charles E. Knox.)

A. Well, we had expended the amount of money to pay for development, found the ore, we were finding more ore; we were a good prospect; there is always more or less struggle in bringing any company to a working basis.

Q. And to a paying basis?

A. And to a paying basis; yes, sir, even when you have a good mine.

Q. And had it reached that stage in its development at that time? A. It was beginning to pay.

Q. When Mr. Dunlap went there?

A. Yes, that is my impression.

Q. Wasn't it heavily in debt at that time?

A. No, sir.

Q. You think not? A. No, sir.

Q. During the time that Mr. Dunlap was Secretary and Treasurer were any dividends paid, or do you know?

A. I think the first dividend was paid during Mr. Dunlap's,—yes, a five cent dividend the first day of December, 1904.

Q. A five cent dividend? A. Yes.

Q. What was the capitalization of that Company?

A. One million shares; that was a dividend of about $42,000 on the issued stock. **[217]**

Q. Deducting, I presume, the treasury stock?

A. Well, we declared the dividend on the treasury stock, and put that aside; we distributed a $50,000 dividend.

Q. You employed Mr. Dunlap yourself, in Missouri, as I understand it? A. Yes, sir, I did.

(Testimony of Charles E. Knox.)

Q. Old time friends back there? A. Yes, sir.

Q. You were the general manager of the Company? A. Yes, sir.

Q. And you agreed with him about the salary, about what his salary should be? A. Yes, sir.

Q. And instructed him to proceed and come out, and to assume his duties as Secretary and Treasurer? A. Yes, sir.

Q. A few months afterwards his salary was increased to $200, wasn't it?

A. Yes, sir, and the transfer fees.

Q. And the transfer fees? A. Yes, sir.

Q. Through whose instrumentality, or do you know?

A. The three directors, Wampler, Douglass and Badgett.

Q. Were you consulted about that matter?

A. No, sir.

Q. You knew nothing about that?

A. No, sir, not until after it was done.

Q. After it was done you approved it, I presume?

A. I did, the $200; I knew nothing about the transfer fees at the time; I did not approve that.

Q. You have already testified you were not present, but you knew about it afterwards, and approved of it, if I understand?

A. I approved of the salary increase, but not of the fees being voted to any officer of the Company.

Q. No steps were taken to change that part of it?

A. No, after the Salt Lake interview Mr. Dunlap agreed to refuse **[218]** to go up the hill when they

(Testimony of Charles E. Knox.)

moved the office up the hill; so his resignation took effect according to agreement, when we moved the office.

Q. How long was it after the salary was raised to $200 per month that the Salt Lake interview, concerning which you have testified, took place?

A. Why, the events took place before the interview; he was receiving $200 per month at the time that he asked for an additional $100.

Q. How long was it after that time that the Salt Lake interview took place?

A. Oh, after the advance?

Q. Yes.

A. I am unable to state; the minutes will show that, I don't remember the date.

Q. And at that time, if I understand you correctly, Mr. Knox, Mr. Dunlap personally requested you then and there to state whether or not he could have an increase to $300? A. To me, personally?

Q. I say to you, personally. A. Yes.

Q. And do you remember anything taking place at the conversation between you and him on that subject matter, other than what you have stated?

A. Well, I told him to go back into the meeting and vote as he pleased; I was offended at being approached at that particular time, because Mr. Dunlap held the balance of power in the Board of Directors, and if he had voted for Mr. Morris, who was a candidate for the presidency, he would have elected Morris instead of Knox, and I objected to being asked that question, just before that ques-

(Testimony of Charles E. Knox.)

tion was to be settled.

Q. Did Mr. Dunlap say anything to you whatever, Mr. Knox, in the **[219]** way of an intimation that that would affect his vote in that contest for the presidency?

A. I said, "I will put it up to the Board, we are going to meet right now," and he said, "I don't want to put it to the Board. I want to know how you feel about it right now," and I told him how I felt.

Q. That was with regard to his request for an increase? A. Yes.

Q. Did he say anything or intimate anything to you, whether or not he was allowed an increase of salary, that would affect his action as a director, as to the election of a president? A. No.

Q. You assumed that was the case, did you not?

A. I presume I did, yes, sir.

Q. And the basis of that assumption was because of the time and place that he asked for an increase in his salary from $200 to $300 a month?

A. Yes, sir; because he had called me out of the meeting when the seven men were there around the table ready to organize, called me out at that moment to get a personal expression from me as to whether I would agree to an increase of the salary.

Q. You and he were friendly, were you not?

A. Yes, sir, we were friendly, and we should have ceased at that time.

Q. There was no demonstration whatever made by him in the meeting to verify the conclusions that

(Testimony of Charles E. Knox.)
you had reached, was there? A. No.

Q. He voted for you, didn't he?

A. Yes, sir, it was unanimous. [220]

Q. You told him at that time that you would accept his resignation then and there?

A. So far as I was personally concerned, I would accept his resignation right then and there.

Q. What did he say?

A. I don't remember that he replied to that at all; I further remarked, "Go back into the meeting and vote as you please." We both walked into the meeting.

Q. After the Salt Lake meeting had ceased, did Mr. Dunlap continue for a time thereafter to perform the duties of the office? A. Yes, sir.

Q. Did you have any conversation with him afterwards upon the subject of an increase?

A. No, sir.

Q. He never said anything to you about it at all?

A. No, sir, I cannot recall any further conversations about an increase in salary.

Q. You have no recollection, Mr. Knox, of stating to him at any time during his connection with the Company that you intended to see, or would use your efforts for Mr. Dunlap to be compensated for services which he claimed to have rendered outside of his duties as Secretary and Treasurer?

A. No, sir, I don't remember a conversation concerning that.

Q. Are you quite positive that no such conversation ever took place between you and him?

(Testimony of Charles E. Knox.)

A. I can't say that, Mr. Summerfield, there might have been such a conversation.

Q. Might have been, but if there was you do not recall it? A. No, sir, I do not.

Q. Well, with reference to Mr. Dunlap going to Reno, seeing the Surveyor General about the patents of the Company, and to Carson **[221]** and to Belmont; do you remember whether he went on his own volition, or whether you requested him to attend to that business?

A. Why, the instruction was a general one to comply with any request made by the special Washington attorney.

Q. Mr. Clark?

A. Mr. Clark, in securing those patents.

Q. And you told him to proceed promptly, did you not, in all those matters?

A. Promptly, yes, sir; that we wanted to be the first to get a patent in Tonopah; and Mr. Dunlap, I think, was prompted by the same spirit that I was, he was ambitious for Montana to be the first.

Q. And he was zealous in the matter for the Company, was he not? A. He was, yes, sir.

Q. And left his office as Secretary and Treasurer and went to Reno and went to Carson and went to Belmont?

A. Why, it was his duty as Secretary to go wherever the duties of that office required him to go.

Q. Do you say it was his duty, or do you know whether it was his duty, Mr. Knox, as Secretary and Treasurer of that Company to go to those places,

(Testimony of Charles E. Knox.)

and to perform that character of service?

A. If not as Secretary, certainly as the attorney in fact.

Q. Was he ever the attorney in fact of that Company?

A. For the purpose of taking those patents out; yes.

Q. Do you know whether he ever had a power of attorney from the Montana-Tonopah Company to act for it in his life? A. Well, I think he did.

Q. You think so?

A. I have been positive until you apparently question it; I think that he did.

Q. Have you any recollection of ever seeing such power of attorney?

A. Well, I think in those instances it is a special power of attorney for the particular purpose of taking out patents. **[222]**

Q. Then it was considered, was it, to the best of your recollection and belief, that in order for him to perform those services, it was necessary that he have special powers from the Company in the form of a special power of attorney?

A. No, the law requires such—

Mr. THAYER.—Just a minute. I have let the questions go on because I thought they would terminate; but it is entirely outside of the record. Mr. Knox has not qualified as an expert.

The COURT.—That is purely a question of law.

Mr. SUMMERFIELD.—I was endeavoring to ask whether he considered it that way, not whether it

(Testimony of Charles E. Knox.)

was necessary or not.

Q. Do you know where that power of attorney is, Mr. Knox?

A. No, sir; I presume it is in the archives of the Company.

Q. Are you positive now that there ever was one?

A. I was positive until you sort of questioned it; it had never arisen; I thought, of course, he had it.

Q. Well, you don't recollect of ever seeing that?

A. No, sir; I did not see the power of attorney.

Q. Do you remember ever signing a power of attorney as president of the Company, for Mr. Dunlap?

A. No, I don't remember.

Q. Do you remember of ever being advised or informed by the Secretary of the Company, that he had ever done so?

A. He was Secretary of the Company himself.

Q. Oh, at the time? A. Yes, sir.

Q. You were the President and he was the Secretary?

A. Yes, sir; the Vice-President might have executed it in my absence.

Q. Who was Vice-President?

A. Mr. A. C. Ellis, Jr., of Salt Lake. **[223]**

Q. Were you ever informed or advised by Mr. Ellis that he had ever executed a power of attorney for the Company?

A. Mr. Summerfield, Dixon & Ellis, credited as being emiment mining lawyers were our attorneys; they prepared all the papers for the patents for our property; I assumed that they prepared what was

(Testimony of Charles E. Knox.)

necessary, and did it in the proper form; and, whether they did or not, I have never known of anything that they left undone in that case; I therefore assume that the power of attorney was properly executed.

Q. You say that Mr. Ellis was Vice-President of the Company? A. Yes.

Q. My question was, Mr. Knox, if you were ever advised or informed, or had any knowledge that Mr. Ellis, as the Vice-President of the Company, ever executed a power of attorney to Mr. Dunlap?

A. No, I don't remember.

Q. I take it then, that the instructions or directions, or whatever they were, to Mr. Dunlap with respect to that subject matter, emanated from Mr. Ellis, or the firm of Dixon & Ellis, is that correct?

A. Yes, we complied with their instructions in all of the preliminary work, and after the receiver's receipt had been issued, with the instructions of Mr. Horace F. Clark.

Q. The Washington attorney?

A. The Washington attorney, yes.

Q. The Company succeeded in obtaining its patents, did it not? A. Yes.

Q. And they were the first patents obtained for mining ground in the Tonopah District, were they not? A. Yes, sir.

Q. Now, do you or do you not know, Mr. Knox, whether or not, as a matter of fact, Mr. Dunlap did anything in the matter of negotiating a settlement of the Swope case, before it was taken up at Inde-

(Testimony of Charles E. Knox.)

pendence, Missouri? [224]

A. Excepting that he made the statement, that is all I know about it, that he had interviews with Thomas Swope; I know that all of the negotiations, whether by Mr. Dunlap, Mr. Collins, Mr. Alexander, had resulted in failure up to that time, so far as getting Mr. Swope to name a definite amount to which he thought he was entitled; and not until I interviewed Mr. Swope's attorney in the Crissman-Sawyer Bank in Independence, was the amount specified, and that amount was $7,500; Mr. Dunlap testified that there was no amount, so far as he knew.

Q. Were the statements which were made to you by Mr. Dunlap with reference to interviews with Swope, made to you as they were proceeding, or after the matter had been closed up?

A. I knew nothing of Mr. Dunlap's connection with that case until he stated it here on the stand yesterday.

Q. And that was the first knowledge you had that he had ever interested himself in that case at all?

A. Yes, it so happened that all of my knowledge was brought to me in letters from Mr. Collins.

Q. Were not you present at a meeting of the Board of Directors on February 15th, in which that matter of the adjustment and the settlement of the Swope case, and of Mr. Dunlap's connection with it was specifically discussed?

A. Was that the date that this resolution that was read to me was passed?

Q. Yes. A. That was after it was all over.

(Testimony of Charles E. Knox.)

Q. I understand; but just a moment ago I understood you to say, Mr. Knox, that you never heard of Mr. Dunlap being connected with the Swope matter until you heard him testify to it on the witness-stand? A. That is what I said, sir. **[225]**

Q. Now I ask whether or not at the meeting of the directors of the defendant Company, February 15th, 1910, at which you were present, the Swope matter and Mr. Dunlap's connection with it, was not discussed at that time, in your presence and hearing?

A. It might have been discussed, I do not recall it; I know the matter was settled, and the Board authorized me to make the settlement on the terms which I had agreed upon with Mr. Paxton; now as to what efforts had been made prior to that time, why it is perfectly reasonable that Mr. Dunlap should have related what he did, and all of the others, but I don't remember any conversations; I do remember that the Board approved of the settlement that was about to be made, the amount of the doctor's bill; I did not burden my memory with the conversation that took place at the time.

Q. You say that when you are absent from Tonopah you receive daily, weekly and monthly reports of the Company's business transactions?

A. Yes, sir.

Q. How do you receive them?

A. I receive the assay sheets, signed by R. T. Ashley, they are mailed by the Secretary; my weekly reports are signed by Mr. Collins, superintendent, and by Mr. Laurie, the engineer.

(Testimony of Charles E. Knox.)

Q. Has it been the course of management of the business of the Company since its organization, for you to receive daily reports from the Secretary, containing the assay sheet showings?

A. Not from its inception, no, sir.

Q. Was that the case during the time Mr. Dunlap was Secretary and Treasurer? A. No, sir.

Q. Has that been a late improvement in the method of conducting the business?

A. Yes, that is one of the improvements of Mr. Alexander's system over Mr. Dunlap's system of bookkeeping. **[226]**

Q. That was since Mr. Alexander became Secretary? A. Yes.

Q. It commenced, didn't it, after they got a mill, there was no use for it before, was there?

A. Yes; I did not receive the daily reports before the mill was operated.

Q. The Ursine and Smeigh cases, as you remember, were settled through the instrumentality of Mr. Collins. is that correct?

A. Yes, sir; I made the final settlement, agreeing on the specific amounts they should receive; as to what preliminary work was done, I don't know.

Q. You do not know whether Mr. Dunlap had actively or otherwise exerted himself in the matter of bringing the parties together, so that they could settle it?

A. No, sir, according to the information I received from the superintendent's letters, why it was being conducted by Mr. Collins.

(Testimony of Charles E. Knox.)

Q. That was the extent of your information, was it? A. Yes, sir.

Q. And you are not able to say, as a matter of fact, whether he did do so, or did not do so?

A. No, sir.

Q. Do you remember where the settlement was made?

A. I think it was in Mr. Gibbons' office, Mr. Summerfield.

Q. Wasn't it in the Secretary's office, Mr. Dunlap's office?

A. The Secretary's office is up at the mine, sir; no, it was not at the mine.

Q. Was it at his office downtown?

A. It might have been, I hardly think it possible, Mr. Summerfield; I think the meeting was in Mr. Gibbons' office.

Q. That is your best recollection of the matter?

A. Yes, sir.

Q. And who do you recollect as being the parties present, maybe that might refresh your mind? [227]

A. Well, Smeigh, Ursine, Gibbons, Collins, and possibly Mr. Dunlap.

Q. Do you remember whether Mr. Collins was present?

A. Yes, I am quite positive Mr. Collins was present; I know he made the appointment; I am under the impression that he walked down the hill.

Q. Do you remember of receiving a telephone from Mr. Dunlap about the appointment, and where

(Testimony of Charles E. Knox.)

you should meet?

A. Why, no, I don't remember, he might have telephoned.

Q. You simply do not recall the matter?

A. No; there was never any effort to keep Mr. Dunlap out of anything; we were all a happy family, and he might have telephoned; it might have come that way; he might have gone down from lunch and gone to Mr. Gibbon's office and made the appointment, and telephoned Mr. Collins, or might have telephoned me.

Q. You might have been present and participated?

A. Yes; the most vivid recollection I have of it is the conversation I had with the two men, and the amount of money that we paid; as to who was sitting around, and how they felt, and how they looked, I did not impress that upon my memory.

Q. You have a distinct recollection of the forcible manner in which one of the men expressed himself about the amount he claimed on account of his condition?

A. Yes, giving his youth as as affliction in this case.

Q. And of the negotiations resulting in the settlement with him upon the terms which you specified?

A. Yes, I remember that distinctly, and taking the six months wages off of the amount.

Q. If I understand you correctly, you do remember that Mr. Dunlap did conduct negotiations in the Mitchell case? **[228]**

A. Yes, he was Secretary of the Company.

(Testimony of Charles E. Knox.)

Q. That is correct, is it not?

A. Yes, that is correct.

Q. Do you know what negotiations he conducted, what the character of them was, or how frequent they were, or anything about that?

A. My impression was that most of his conversations were with Jimmie Weeks, and that his correspondence with the Liability Company afterwards was really the greatest thing that he did; that is, consumed more of his time than anything else.

Q. You followed the matter reasonably closely, did you not, Mr. Knox? A. Yes, I did.

Q. And I believe you have already testified that Mr. Weeks was an intimate friend of the Mitchell family? A. Yes.

Q. If I understand you correctly then, so far as the negotiations Mr. Dunlap had, they were principally through Mr. Weeks, an intimate friend of the family, as an intermediary?

A. That was my impression; I may do Mr. Dunlap an injustice in that; he may have visited the family often, and presented his arguments; but that is the impression I have, that it was through Jimmie Weeks.

Q. You do not pretend to be positive, and, as you say, it is simply an impression in your mind?

A. No, sir, I would not.

Q. The Brown case that you mentioned was settled principally through yourself, was it?

A. Well, Mr. Alexander and Mr. Collins were there, the four of us were there.

(Testimony of Charles E. Knox.)

Q. Do you know whether or not Mr. Dunlap participated in any way in bringing the parties together, to see whether they could adjust the matter between the claimant and the Company? [229]

A. With Mr. Brown?

Q. No, Mr. Dunlap, I say whether Mr. Dunlap did anything?

A. Mr. Dunlap was not in Nevada at that time.

Q. Oh, I believe you testified that he was not in Nevada at the time? A. Yes.

Q. Now the Merton case, you don't know anything about? A. No.

Q. The Burns case was settled, as you remember it, on the advice of Mr. Collins?

A. Yes, Mr. Collins.

Q. And who acted for the Company in the actual settlement?

A. Mr. Alexander issued the check on my instruction, after an interview with Mr. Collins in San Francisco; Doctor Clark was sick in the hospital, and we wanted to get the money to him quickly, and the settlement was authorized in that way.

Q. Was that while Mr. Dunlap was connected with the Company, or rather, was that while he was at Tonopah?

A. I think he was, I am not sure as to that.

Q. You are not positive about that?

A. No, sir.

Q. When do you remember of first having the assessment of the Company's property for the year 1907 called to your attention, Mr. Knox?

(Testimony of Charles E. Knox.)

A. It was in the fall of 1907, in October or November.

Q. Was it prior to the meeting of the Board of County Commissioners, while sitting as a Board of Equalization?

A. Well, it must have been just a week prior; the most distinct recollection I have of that was the statement of Mr. Dunlap, that he was going before the Board next Tuesday anyhow.

Q. Did that matter come up at a Board meeting, do you remember?

A. As I stated, I think it was a Board meeting, but I am not sufficiently positive on that point to affirm it. **[230]**

Q. At any rate, the matter was discussed in your presence, and by the officials of the Company, was it not? A. Yes, sir.

Q. Do you remember what the point of objection by the Company was at that time?

A. To the amount of the levy?

Q. Yes; the amount of the assessment instead of the levy?

A. Well, it was due to the fact that we had been operating the mill only the last quarter of the year; prior to that time we considered the mill a dead expense, it was an out-go; beginning with the last quarter of that year we received an income from it, and felt it was right to pay taxes for that period.

Q. If I understand you correctly, the view of the officials of the Company was that it ought not to be taxed for the construction period of the mill?

(Testimony of Charles E. Knox.)

A. Yes, sir.

Q. That it should be upon the basis of the value of the mill from the time it became operative, is that correct? A. Yes, sir, that is correct.

Q. Well, who called the attention of the officers of the Company to the assessment, and to that particular point of consideration? A. I don't know.

Q. You don't remember? A. No, sir.

Q. Do you remember whether or not Mr. Dunlap did?

A. No, I don't remember whether it was Mr. Dunlap or Mr. Alexander.

Q. Your recollection is, at any rate, that after some discussion of the matter, that Mr. Dunlap volunteered that he would go before the Board and endeavor to secure a reduction?

A. The following Tuesday, yes, sir.

Q. Was that acquiesced in?

A. Yes, sir, that was acquiesced in.

Q. Was not he requested by yourself to do so?

[231]

A. No, if it was it was the first time I ever had a chance to ask him; he usually volunteered to do things.

Q. Do you have a clear recollection whether you requested him to do so or not?

A. No, I have a recollection of the statement, "I am going before the Board next Tuesday anyhow, and I will take it up," and I think it was merely acquiescence of the Board, but not a request.

Q. Your recollection of the statement is that it

(Testimony of Charles E. Knox.)
conveyed the idea that he had other business before the Board?

A. Yes, sir, and to be specific, I thought it was Round Mountain business that he was going on.

Q. You do not remember who was present, do you, besides yourself, and Mr. Alexander?

A. I think Mr. McQuillan, Mr. Lynch and Mr. Alexander.

Q. Was there ever any report made to the directors by Mr. Dunlap about what he did and what took place?

A. He might have made that report at a meeting at which I was absent; I don't remember that he made it at a meeting at which I was present.

Q. You say that Mr. Dunlap and you never were partners in anything except one business transaction, about buying an interest in a mine?

A. He was in one deal only in which I bought some property and divided equally with him.

Q. Now, you are quite positive, are you, Mr. Knox, that never until about February 14th, 1910, did you have any expectancy or belief or knowledge that Mr. Dunlap expected compensation for the services mentioned in his complaint in this action?

A. While there was no definite conversation about that, I had sort of an intuition that he was going to ask for some; I think **[232]** that is as nearly as I can express it; there were never figures mentioned. When my salary was voted a year ago in November, Mr. Dunlap advocated it very strongly, and I had a sort of feeling that he would ask for something,

(Testimony of Charles E. Knox.)

and always have.

Q. You had an intuitive feeling at that time?

A. Just an intuitive feeling.

Q. That there would be reciprocity expected; is that about what you mean; is that about it?

A. That is about it, yes, sir.

Q. You do not recall any conversations that you participated in that would ordinarily have led Mr. Dunlap to believe that he would be compensated for those services? A. No, I do not.

Q. Now, he was Vice-President and a director of that Company there at Tonopah for about five years, wasn't he?

A. Yes; he was a director; I don't know that he was Vice-President for more than four, perhaps three and a half.

Q. He was a director for about five years, and Vice-President a part of the time? A. Yes.

Q. For about four years?

A. From 1906,—about four years, yes, sir; about four years, I think perhaps he was elected in 1905; I am not sure about that.

Q. Those offices were not salaried offices, as I understand you?

A. No, sir; and it was never the intention of making them so.

Q. He was active and zealous in the interests of the Company, so far as you know, during that time, wasn't he? A. Yes, sir.

Q. Six directors during that time were nonresidents of the State?

(Testimony of Charles E. Knox.)

A. Yes, sir; well, I could not say all of that period. Mr. Summerfield; there might have been times we had four or five directors in Tonopah; but of late years, the last two or three years certainly six of them have resided out of the State. **[233]**

Q. And you firmly believe that all of that time, whatever he did do there was simply incidental to his office as a director, and as a Vice-President, and that he would not be paid for the same by the Company?

A. I felt that he was receiving a greater benefit than he was giving.

Q. You felt that way? A. Yes, sir.

Q. You did not believe, and don't now believe, that his services were of any value whatever?

A. No, sir, and at times detrimental.

Q. And at times detrimental? A. Yes, sir.

Q. Were you present when he was elected Vice-President?

A. I think I was; I am under the impression that he was elected in Salt Lake in 1905; if so, I was present.

Q. Wasn't he re-elected afterwards?

A. Yes; I think he has either been first or second Vice-President ever since that time; I don't remember a time that he was not.

Q. Do you remember whether or not on each occasion you voted for him as Vice-President?

A. Oh, yes, I voted for him every time; I am always for Dunlap.

Q. When you voted for him for Vice-President

(Testimony of Charles E. Knox.)

each time, you knew in the event of your absence, that it was his duty to discharge the functions of the President's office, did you not? A. Yes, sir.

Q. And did you have in mind upon these successive re-elections of him as Vice-President that he was a detriment to the Company? A. Yes.

Mr. SUMMERFIELD.—That is all.

Q. (Mr. THAYER.)—You say that a salary was voted you last year?

A. A salary as general manager, yes, sir; a year ago last September. **[234]**

Mr. THAYER.—I do not wish to ask the next question without permission of the Court; one time it was ruled that I could not go into that; now it is opened.

The COURT.—If counsel does not object, I shall not interfere.

Q. Was that the first time you had received a salary from the Company? A. Yes.

Q. That was beginning with September, 1909?

A. Yes.

Mr. SUMMERFIELD.—I object, if the Court please, upon the ground it is immaterial, incompetent and irrelevant to any issue in the case, and it is an attempt by rebuttal, to impeach testimony.

The COURT.—I think the same about it now as I did when I ruled in the first instance, but until counsel objected I concluded he was willing it should go in.

Mr. THAYER.—Unless there is something that occurs to the witness pertaining to the issues of this

case that he would like to state to the Court and jury, that will be all, excepting a little documentary evidence I will put in in the morning.

Court adjourned until September 24th, 1910, at 10 A. M.

[Proceedings Had September 24, 1910.]

Court convened, Saturday, September 24th, 1910, 10 A. M.

The COURT.—Gentlemen, I have given more thought to the second paragraph of the resolution of the Board of Directors, on page 106 of the minutes of the Company, and have concluded to admit that second paragraph. The resolution recites that certain services have been rendered by the plaintiff, then follows a short paragraph of something like three lines, in which it says, it is the sense of the corporation, that these should be reimbursed, or something to that effect. **[235]**

Mr. THAYER.—The ruling is excepted to for the reason that the evidence offered is irrelevant, immaterial and incompetent, as not being binding upon the defendant corporation, but the mere expression of an opinion of certain directors of the corporation; and for the further reason that the resolution was adopted at the meeting of the Board of Directors held subsequent to the time at which the services alleged in this action to have been performed, were performed; and the offer or recognition of plaintiff's alleged rights is without consideration, and void; and for the further reason that the evidence is not admissible, because it is an offer to compromise or compound the claim of the plaintiff, which is the subject

of this action against the defendant corporation.

Mr. SUMMERFIELD.—I desire, in view of the ruling of the Court, at this time to read the evidence. Your Honor made a *pro forma* ruling, rejecting the offer which I made specifically of that portion of the minutes which has now been admitted in evidence, and I now ask to read it into the record; and in view of the fact that which has already been admitted in evidence is connected with that which has just been ruled on, I desire to read it altogether. (Reads:)

"Whereas at times during the past five years it has been necessary to call upon Vice-President Dunlap to perform in cases of emergency duties other than those usually designated as the duties of Vice-President, such as the exercise of his good offices in behalf of the Company in case of accident to employees of this Company, more particularly in the case of John Mitchell, S. Merton and others; his efforts in behalf of the Company in securing a reduction of taxes on the properties of this Company, more particularly the taxes for the year 1907, when the tax [236] against the mill was $3,450, which through Mr. Dunlap's efforts was reduced $862.50, thereby effecting a saving of $2,587.50, and at the same time a reduction of $5,875 in the assessed valuation of the surface improvements, resulting in a saving of $202.88, and the separate listing of the railroad spur, effecting a saving of $78.09," now I read the portion which has just been admitted in evidence: "It is the sense of this Board that Mr. Dunlap is entitled to come compensation for the services ren-

(Testimony of Charles E. Knox.)
dered in these matters."

Mr. CHARLES E. KNOX.

Q. (Mr. THAYER.) State whether or not you are connected with other mining corporations operating in Nevada.

Mr. SUMMERFIELD.—I object, if the Court please, as being immaterial to any issue in this case.

The COURT.—I will overrule your objection for the present. A. Yes, sir.

Q. State whether or not you know what duties have been performed by the secretaries and treasurers of such corporations as you are connected with in the Tonopah Mining District.

Mr. SUMMERFIELD.—I object, if the Court please, upon the ground that the testimony sought to be elicited is incompetent to any issue in this case, for two reasons: First, that until it is shown that the by-laws of the Company are not definitive of the duties of the office of the particular corporation, it would be incompetent; and, second, even though it might be permitted to establish by custom the duties of officers, yet a custom could not be proven by what the course of conduct would be in some particular **[237]** offices with which the witness might be connected. Even if it should be held that proof by custom can fix or establish the scope of the duties of an officer of a corporation, which I am not prepared to admit at present, but even if that should be held, in order to admit proof to establish a custom, it would have to be shown, incident to the admission of such proof, in my opinion, that they were corporations

(Testimony of Charles E. Knox.)

similarly situated, and who did not have by-laws, that they might be placed in the same legal status as the defendant corporation.

The COURT.—Is it absolutely admitted in this case that there was no understanding whatever as to what the duties were?

Mr. THAYER.—There is evidence.

The COURT.—And that there is no rule of this corporation of any kind, no understanding between Mr. Dunlap and the authorities of this Company as to what the duties were?

Mr. THAYER.—There is evidence to that effect.

The COURT.—Absolutely no understanding whatever?

Mr. THAYER.—That is the evidence as it stands at the present time.

The COURT.—Then he was employed simply as Secretary and Treasurer?

Mr. THAYER.—He was employed as Secretary and Treasurer; he was employed by the Company, and that was the title given him.

The COURT.—I will sustain the objection, because that may include the services that are regulated by contract, with services that are absolutely free from any regulation by contract.

Mr. THAYER.—I ask for the benefit of an exception.

Q. State whether or not you know what duties have been customarily performed by secretaries and treasurers of mining companies operating [238] in the Tonopah Mining District, where no express

(Testimony of Charles E. Knox.)

contract has been made with the corporation with reference to such duties to be performed.

Mr. SUMMERFIELD.—I object to the evidence sought to be elicited, and to any answer that would properly be responsive to the question propounded, upon the ground that it eliminates from consideration whether or not such mining companies of which the witness might have knowledge were mining companies operating under by-laws containing a definitive regulation of what the duties of its officers were; and, second, upon the ground that it cannot be proven under the law, properly, in my opinion, what the custom of one corporation is by proof of what the customs of others were, even though they were in the same locality, unless, at least, there has been antecedent proof that under their articles of incorporation first, and under their by-laws second, if any there be, that they practically operate under the same legal status.

Mr. THAYER.—I do not think the objection is pertinent to this question.

(Question read.)

Mr. SUMMERFIELD.—I add as a further ground of objection, that the question itself is multifarious, embracing independent elements, not properly to be connected with each other, of which the first element is to be responded to by the witness before he could be interrogated as to the succeeding elements of the question.

Mr. THAYER.—He is not interrogated as to succeeding elements, he is asked if he knows something;

(Testimony of Charles E. Knox.)

state whether or not he knows, is the question.

The COURT.—It does not seem to me that contains all the elements. Here you have a situation where the duties are not regulated by the laws of the Company, or by any contract, or by its [239] charter; the contract you have eliminated, but you have not eliminated the other from your question. I will sustain the objection for that reason.

Mr. THAYER.—We save an exception, if your Honor please.

Q. State whether or not you know whether prior and subsequent secretaries and treasurers of the defendant corporation, at a time prior to the adoption of the by-laws of this corporation, performed similar duties, without extra compensation, to those duties which were performed by the plaintiff in this action.

Mr. SUMMERFIELD.—Object to the question propounded, if the Court please, upon the ground that the question is not limited to a consideration of corporations who had no by-laws, and who did not operate under by-laws at all. The question does not ask for a response from this witness as to whether other corporations which did not have by-laws executed the duties of the kind and character that are involved in this case. And I object to the evidence sought to be elicited upon the ground that if there were no by-laws definitive of the duties of the office of secretary and treasurer, that because he might have executed similar duties to some other employee of the office in that respect, it would not be material as to whether, under all of the evidentiary facts and

(Testimony of Charles E. Knox.)

circumstances of this case, an implied promise upon the part of the corporation did not exist to pay this particular plaintiff for his services, if any there were performed by him, outside of the scope of his duties of the office of secretary and treasurer.

Objection sustained.

Mr. THAYER.—I ask for an exception to the ruling of the Court for the reason that the defendant, as a matter of law, is entitled to prove what duties this plaintiff is presumed to have performed, [240] by showing what duties were performed by other officers of this corporation serving in the same capacity as the plaintiff, under circumstances similar to those which prevailed at the time the plaintiff served the Company.

Q. State whether or not, Mr. Knox, the plaintiff knew of what duties were customarily performed by the Secretary and Treasurer of the defendant corporation occupying that office next prior to the plaintiff.

Mr. SUMMERFIELD.—Object to the question propounded upon the ground that any answer responsive to the question would call for the mere opinion of the witness as to the mental status of another person.

The COURT.—I will allow that question to be answered yes or no, provided it is followed up with a further question to show how he knows.

A. Yes.

Q. How do you know that the plaintiff had such knowledge?

(Testimony of Charles E. Knox.)

A. Because all of the records and the affairs of the Company, as well as the mine, were thrown open to Mr. Dunlap's inspection before he accepted the position of Secretary and Treasurer; he had ample opportunity to study every action of the secretary and treasurer serving at that time, and to question him upon any duties that he performed that did not show in the records.

The COURT.—The first answer will be stricken out, and the last answer will be allowed to stand, unless you wish to follow that up with further testimony. The other question was whether he knew, and Mr. Knox said he did know; then he is asked how he knows, and his answer is he had abundant opportunity to know; that is the effect of the answer. **[241]**

Q. State whether or not you know whether the plaintiff talked with his predecessor in the office of Secretary and Treasurer of the defendant corporation as to the duties of that officer.

A. I know that he talked to him about the affairs of the Company; I would have to assume that it was a discussion of the detail work.

Mr. SUMMERFIELD.—I move to strike out the assumptive part of the answer.

The COURT.—That part may be stricken out.

Q. Do you know that he talked with him about the Company? A. Yes.

Q. Do you know what has been the custom, or what duties have customarily been performed by secretaries and treasurers of mining corporations in

(Testimony of Charles E. Knox.)
Nevada, where there has been no express contract between the corporation and such officers, or where the by-laws, if any, have not defined the duties of Secretary and Treasurer, where there were no by-laws, or where the articles of incorporation or charter of such corporation have not defined the duties of such officer?

Mr. SUMMERFIELD.—Object to the question propounded, if the Court please, upon the ground that the scope of the question is entirely too broad, it being made to the entire State of Nevada; that it should be limited, with reasonable proximity, to the field of operations of this Company. And in support of that objection I desire to urge upon the Court that if such testimony is admissible at all, it is only by reason of proximity and the exercise of observant powers that plaintiff would be imputed with the knowledge of what the duties were within the locality coming under his observation. What the course of conduct might have been at Searchlight in Lincoln County or at Ely in White Pine [242] County, or some other place, I submit that knowledge of it ought not to be imputed to this plaintiff.

(Objection sustained.)

Mr. THAYER.—The Court will give me the benefit of an exception, first, that the question is preliminary, and only to elicit the answer of yes or no, as to whether or not the witness has such information.

The COURT.—You may note the exception.

Q. State whether or not you know what duties are usually or customarily performed by secretaries and

(Testimony of Charles E. Knox.)

treasurers of a mining corporation operating in Nye County, Nevada, where the by-laws of such corporation, if any, do not define the duties of Secretary and Treasurer, or where there are no by-laws of such corporation; or where the charter or articles of incorporation do not define the duties of such office.

(Same objection. Same ruling.)

Mr. THAYER.—And the same exception; and in addition to that exception that the defendant by the question is attempting to show what duties are customarily performed by an officer of a corporation acting and employed under similar conditions, and in the locality where the services alleged to have been rendered by the plaintiff were rendered for the defendant corporation.

Q. Do you know, Mr. Knox, what the duties have been, performed under circumstances similar to those related in the last question, in the Tonopah Mining District?

Mr. SUMMERFIELD.—I object upon the ground that any answer responsive to the question in the form propounded would be incompetent and irrelevant to any issue in this case.

The COURT.—I think the objection is good. You have said similar conditions; but you have not confined it as to time; the [243] custom may be very different now from what it was when the camp was starting.

Mr. THAYER.—I do not desire to make any suggestions that are impertinent to your Honor, but I think we might save a good deal of time if your Honor

(Testimony of Charles E. Knox.)
will make the ruling that we will not be permitted to show the customs.

The COURT.—I have not so ruled. I have indicated that if you attempted to prove the duties of the office by custom, it should be confined to what the custom was at that time and at that place, and under conditions similar to those which exist here.

Mr. THAYER.—I will try to frame a question that will bring it within your Honor's suggestion.

Q. Will the witness state whether or not he knows what duties were usually and customarily performed by secretaries and treasurers of mining corporations operating in the Tonopah Mining District in the State of Nevada, between the dates of January 15th, 1903, and February 21st, 1905, when such corporations had no by-laws, or had no express contract with the Secretary and Treasurer of the corporation in regard to the nature of his duties as such officer, and where the articles of incorporation or charter of such company made no provision with reference to the duties to be performed by such officer? A. I do.

Q. State whether or not in such cases referred to in the last question to which you have replied, "I do," the duties performed by such officers were similar or dissimilar to those performed by the plaintiff in this action while he was serving as Secretary and Treasurer of the defendant corporation?

Mr. SUMMERFIELD.—Object to the question propounded, if the Court please, upon the ground it is leading, suggestive of the **[244]** answer, sus-

(Testimony of Charles E. Knox.)

ceptible of being answered merely by yes or no, as containing, in the form propounded, the nature of the answer required, and as not calling for testimony of the witness of the nature of the duties that were performed by those officers under the circumstances and conditions delineated in the question itself.

The COURT.—I will sustain the objection; let the witness state the facts, what the duties were.

Defendant excepts to the ruling.

Q. State what duties are performed as secretaries and treasurers of corporations operating in the Tonopah Mining District, and were performed by such officers during the period between January 15th, 1903, and February 21st, 1905, when such corporations had no by-laws defining the duties of the Secretary, or had no by-laws whatever, and where there was no contract existing between the Secretary and Treasurer and his employer corporation, and where the articles of incorporation of said company did not define the duties of such officer?

A. In addition to the clerical duties, the secretaries were active in the affairs of the Company, in dealing with men and companies in the transaction of the business of that Company, and the payment and settlement of taxes, and the settlement of damage claims. I performed such duties as Secretary and Treasurer for the Mizpah Extension Company.

Mr. SUMMERFIELD.—Object to that last portion, as to what Mr. Knox did, as irresponsive.

The COURT.—That may be stricken out.

(Testimony of Charles E. Knox.)

Q. You were present at a meeting of the Board of Directors on February 15th, 1910, you have testified I believe, Mr. Knox? A. Yes, sir. **[245]**

Q. When the resolution, a portion of which has been read in evidence here, was adopted?

A. Yes, sir.

Q. Will you relate to the Court and jury the circumstances, and what was said and done by the directors with reference to that resolution?

Mr. SUMMERFIELD.—I object to the question in the form propounded, upon the ground that the minutes are the best evidence of what was done.

Mr. THAYER.—I will amend the question by adding, omitting from your answer what action was taken on the resolution.

The COURT.—I will sustain the objection to that question unless it is shown that what was said was in the presence of the plaintiff, I presume that would be proper. What they said among themselves would not be proper; and as to what was done, the record is the best evidence.

Mr. THAYER.—I do not understand that the objection went to that.

Mr. SUMMERFIELD.—If there is any doubt, I desire to include it.

Mr. THAYER.—I take an exception to the ruling.

The COURT.—I sustained the objection unless it was shown that the plaintiff was present; if he was present at that time and heard what was said, you may introduce the testimony, notwithstanding the

(Testimony of Charles E. Knox.)

other objection. As to what was done, the record itself shows.

Mr. THAYER.—I will offer that portion of page 105 of Defendant's Exhibit "A," beginning with the minutes of that meeting, the first fifteen lines of such minutes. Is there any objection?

Mr. SUMMERFIELD.—No, I have no objection.

The COURT.—If there is no objection, it will be admitted. **[246]**

(The minutes offered read as follows: "Tonopah, Nevada, February 15th, 1910. A regular meeting of the Board of Directors of the Montana-Tonopah Mining Company was held at the office of the Company, Tonopah, Nevada, February 15th, 1910, with President Knox in the chair. Members present: Messrs. Knox, Dunlap, Lynch and Alexander. Minutes of the meeting of February 14th were read and approved. It was moved by Mr. Dunlap, seconded by Mr. Lynch, and unanimously carried, that the Secretary be and he hereby is authorized to publish the annual statement as required by the Nevada State law.")

Q. That is the meeting at which the resolution, a portion of which has been admitted in evidence, was adopted, is it not, Mr. Knox? A. Yes, sir.

Q. State what was said with reference to the adoption of that resolution by the members of the board.

Mr. SUMMERFIELD.—Which one?

Mr. THAYER.—The resolution referred to in the testimony.

(Testimony of Charles E. Knox.)

Mr. SUMMERFIELD.—I object on the ground it already appears in testimony that Mr. Dunlap was not present during the consideration of the resolution to which the question is now directed, and that the minutes just read do not show that he was present at the time action was taken upon that resolution; and that the testimony sought to be elicited is incompetent until it is shown that he was present.

WITNESS.—The minutes state that he was present.

Mr. SUMMERFIELD.—If the Court please, it stated that he was present at the time the resolution was offered authorizing the secretary to publish the annual statement. **[247]**

The COURT.—I do not think the statement of that fact would be conclusive on Mr. Dunlap. If you propose to introduce conversations among themselves to prove facts, it is purely hearsay testimony unless the plaintiff was present at the time. If it is a fact that he was present when the conversation occurred, this witness can certainly swear to it, and if he does say so, that is sufficient.

WITNESS.—He was present, your Honor.

Q. Relate the conversation which took place during the time the plaintiff was present?

A. At the meeting of the 15th or the meeting of the 14th and 15th?

Q. Well, the meeting of the 14th and the 15th; the 15th is the one the question goes to.

A. Mr. Dunlap presented his brief, which was the

(Testimony of Charles E. Knox.)

result of the meeting the day before, at which time a discussion of the matter took place in Mr. Dunlap's presence, and with Mr. Dunlap; after he had finished reading the brief, I told him that there were two serious objections to his brief; the first was the comparison of the Montana Company to the Southern Pacific Company, as keeping a slush fund from which amounts should be paid without asking questions; I told him it was a straight business proposition, and that the Montana would not pay out a dollar of its money, unless it could show on a voucher value received for every dollar paid out; and that the comparison was distasteful to me as an officer of the Company. The second objection was that he was the head of the Company in Tonopah, or my personal representative during my absence from camp; I told him that I had no personal representative in Tonopah; that he, as the Vice-President of the Company, had duties to perform as the Vice-President, and he was not substituting me in performing those duties. **[248]**

Q. What reply did Mr. Dunlap make?

A. I cannot recall his exact reply, but he withdrew to allow the Board to consider his brief. The Board accepted the figures presented in his brief without question, and without investigation; we believed that they were correct; I believed that they were correct until a subsequent examination a few days ago, showing that they were not correct. And the resolution which has been admitted was framed on Mr. Dunlap's

brief, and copied *verbatim,* a part of it, from his brief.

Q. What took place after Mr. Dunlap returned to the meeting?

A. The Secretary was asked to advise Mr. Dunlap of the action of the Board, which he did.

Q. What did Mr. Dunlap say?

A. After the resolution was read, Mr. Dunlap polled the directors asking each individually if that was his verdict; the answer was in the affirmative in every case, and Mr. Dunlap then remarked if that was the verdict, he would have to accept it, but that he had something else that he wanted to call to the attention of the Board; he had in his hand at the time a paper, and he stepped out the door in the main office, picked up a pen and signed the paper and handed it to me; it was his resignation as Vice-President and Director of the Company.

Recross-examination.

Q. What are the names of the companies, Mr. Knox, operating in the Tonopah Mining District without having by-laws, and during the period embraced within the time mentioned in this complaint, which required either their Secretary or their Treasurer to adjust tax matters, or to settle claims against the company? **[249]**

A. The Mizpah Extension Company of Tonopah.

Q. Do you know that to be the fact?

A. Absolutely; I was Secretary and Treasurer of the Company.

Q. You were Secretary and Treasurer of the Com-

(Testimony of Charles E. Knox.)

pany? A. And performed those duties.

Q. And during that time? A. Yes, sir.

Q. And yet you were not present in Tonopah over one-third of the time that is mentioned, were you?

A. During that period, yes.

Q. You were?

A. Yes, sir, during that particular period I think I was there half the time. My absences have been exaggerated and my presences minimized.

Q. Sir?

A. I say my absences from Tonopah have been exaggerated and dwelt upon, and my visits to Tonopah ignored in the testimony.

Q. Possibly I misunderstood your testimony in answer to a question of mine, that you would say that you were there one-third of the time?

A. Covering the seven years; during this particular period to which you refer, I was there one-half of the time.

Q. You were there one-half of the time then?

A. Yes, sir.

Q. Now the period I refer to was from the time of the organization of the Montana-Tonopah Company until the year 1907, when you adopted by-laws; now will you say you were there one-half the time during that period?

A. I will; I crossed the desert eighty-four times before the railroad was built into Tonopah.

Q. And the time you were there one-third of the time then, was since that period?

(Testimony of Charles E. Knox.)

A. Yes, since; I have averaged that up by being absent longer periods than I was at that time. **[250]**

Q. Now, you refer to the Mizpah Company alone; can you name any other company?

A. There is a part of the question I could not cover in saying yes to another company, because that is with relation to the absence of contract; I have seen other secretaries perform those duties just as I was performing them, and just as Mr. Dunlap did; as to whether there was a contract covered that, I have no means of knowing, because I did not happen to be on that side of it, I could not get at the records of the Company.

Q. Then, so far as your personal knowledge is concerned, what the custom of mining companies in Tonopah Mining District was, with requiring their secretaries or treasurers to attend to these matters, is confined to the Mizpah Extension Mining Company, is it not?

A. Covering the whole question, I had to confine my answer to the Mizpah Extension Company, yes, sir.

Q. Now, is it or is it not true, Mr. Knox, with reference to the Mizpah Extension Mining Company, the very company that you have mentioned, that Mr. Dunlap attended to those duties, and received $25 a month for attending to some of that matter himself?

A. No, sir, not the period to which I refer; Mr. Dunlap did do some work for the Mizpah Extension Company; he did no work as Secretary and Treas-

(Testimony of Charles E. Knox.)

urer; the Secretary and Treasurer at that time was in Philadelphia, and had his office in Philadelphia, and Mr. Dunlap was merely asked to attend to some stock matters for the Mizpah Extension, purely a clerical duty; he had nothing to do with adjusting damage claims; he had nothing whatever to do with the property during the time it was being operated; it was shut down at the time he performed the services.

Q. And that was for a period of time when he was not Secretary or Treasurer of the Montana-Tonopah Company, was it not? **[251]**

A. No, he was not at that time; that was after his term as Secretary and Treasurer of the Montana-Tonopah Company.

Q. Did you while you were Secretary and Treasurer of the Mizpah Extension Company ever attend to any tax matter for that company at all?

A. For the Mizpah Extension?

Q. Yes.

A. Well, I never appeared before the Board of Commissioners; I paid the taxes; it was put up to me every time from Philadelphia as to the amount of taxes, and if I O K'd it a check was mailed, but not until I did.

Q. You remitted a check for the payment of the taxes from your office in Philadelphia; that is correct, is it not?

A. Well, the Philadelphia office remitted, yes, sir.

Q. The Philadelphia office remitted?

A. Upon my advice that the amount was correct.

(Testimony of Charles E. Knox.)

Q. Did you during the time you were Secretary and Treasurer, or Secretary or Treasurer of the Mizpah Extension Company ever adjust or assist in adjusting any claim for damages for personal injuries against that company? A. Yes, sir.

Q. What case was it?

A. The two men injured were Hill and Clusky; there was a missed hole in the bottom of the shaft, and injured both men very seriously; I had to do with that case.

Q. What did you do, and where? Did you do anything else except to write a check for it?

Mr. THAYER.—I object to that question.

A. I stated that I had to do with the adjustment.

Mr. SUMMERFIELD.—Wait a minute.

Objection overruled. Defendant excepts.

Q. Now you may reply.

A. I did not write a check for it.

Q. What did you do, and where? **[252]**

A. I negotiated with the injured parties, and with their friends in regard to the responsibility of the company.

Q. Where, at Tonopah?

A. In Tonopah, yes, sir.

Q. And you adjusted the matter? A. Yes.

Q. And settled the matter? A. Adjusted it.

Q. And reported it to the Board for settlement, or what?

A. Well, I reported the result of my negotiations to the Board in Philadelphia.

(Testimony of Charles E. Knox.)

Q. As Secretary of the Company?

A. As Secretary and Treasurer of the Company, yes, sir. I want to correct one statement. On second thought, I believe that a portion of the time that I was operating, that I was Secretary and Treasurer of the Mizpah Extension, that Mr. Dunlap kept the pay-rolls in the office of the Montana Company, and performed a service for which he was paid $25; I had not thought of the matter for years, and I was a little hazy on it, but that is my recollection on a little thought. Mr. Dunlap was allowed to handle outside matters in the Montana-Tonopah, and get extra pay for it; he was at the same time Secretary of the Goldfield Portland Company, of which I was President.

Q. But that was not during the time, was it, Mr. Knox, that he was Secretary and Treasurer of the Montana-Tonopah Company?

A. Yes, sir; a portion of it.

Q. Are you sure about that now?

A. You mean with regard to the Goldfield Portland?

Q. No, I mean with reference to the Mizpah Extension Company.

A. Well, I just told you that I am under the impression that during my administration as Secretary and Treasurer of the Mizpah Extension, that the pay-roll, and what books,—we kept no books **[253]** for that Company in Tonopah, but that the accounts were kept by Mr. Dunlap, and that he was paid $25 a month for it. Now, that is the impression that I have; I

(Testimony of Charles E. Knox.)
have not attempted to go over that thing for six or seven years.

Q. I understand; what I was endeavoring to ascertain was when he did that work and when he was being paid for it, was whether that was during the time that he was Secretary and Treasurer of the Montana Company, or after?

A. I am under the impression that it was during the time he was Secretary and Treasurer of the Montana-Tonopah, and it was in the Montana-Tonopah's office down on Main Street, in Tonopah.

Q. Mr. Knox, is it not true, to your own knowledge, that the duties of a Secretary of the mining companies in the Tonopah Mining District, operating without by-laws, and during the period which you have mentioned, to wit, from 1902 to 1907, were confined to attending to the correspondence of the Company, keeping a record of its proceedings, and of the pay-rolls of the Company, and was work of an office nature and character?

A. As a rule, the clerical work was done by a bookkeeper or a clerk; the Secretary was supposed to be an individual, not a machine; and he was not only allowed, but he was expected to demonstrate his individuality; there was no room in that country for machines or automatons, they had to be men, and not men who would split hairs as to whether they could step over this line because they were not using a pen, so that the field was rather a broad one.

Q. It was not necessarily limited to sex, was it?

(Testimony of Charles E. Knox.)

A. No, not necessarily. No, sir, there were some of the other sex operating mines and leases quite extensively.

Q. Was it or was it not expected that they should perform what **[254]** was ordinarily known as field work, running around over the territory and doing outside work?

A. I think that is a little broad, Mr. Summerfield; they were not expected to give their attention to field work.

Q. Now, treasurers, is it not true that they were expected to keep a complete record of the financial transactions of the company; to pay such approved vouchers as came before them; to credit themselves with the money paid out, and to debit themselves with the money that was received? A. Yes, sir.

Q. And wasn't that the extent of their duties under the circumstances which I have enumerated?

A. Where the office was divided, the treasurer was a treasurer exclusively; I think as a rule, he was not as active in the management of the affairs of a company as the secretary usually was, or the Secretary-Treasurer, where it was a combined office.

Q. Now, as you have already testified, you were present at the meeting of the Board of February 15th, 1910? A. Yes, sir.

Q. At the time that the action was taken as indicated by the minutes?

A. Yes; and that was practically the result of two meetings; the preliminary meeting was on the 14th, and the discussion of the affairs with Mr. Dunlap

(Testimony of Charles E. Knox.)

took place at that time; the formal action of the Board occurred on the 15th; Mr. Dunlap made his proposition on the 14th; that is, he did not make a proposition; he stated to the Board that he thought he ought to be remunerated, and that if it was embarrassing to us to discuss it, that he would withdraw from the room; I asked him to state before he left the room what he thought he was entitled to. "Well," he said, "I guess I am entitled to as much as a mucker, ain't I?" I says, "No, Dick, a **[255]** mucker works eight hours every day; you don't work eight hours any day." Well, one of the directors during the conversation figured what a mucker would receive in five years. Mr. Dunlap made no claim for seven years at that time; it was only five that he wanted to cover; and the result was announced by Mr. Lynch that a mucker would earn in five years $7,200 at $4 a day. I says, "Dick, do you think you are entitled to $7,000?" He says, "No, I don't believe I would vote for that myself." Mr. Lynch says, "Will you accept $5,000?" Mr. Dunlap said, "I will consider your proposition of $5,000, Mr. Lynch." I says, "Mr. Dunlap, Mr. Lynch is not in a position to make a proposition for this Board; it will be considered and be submitted to you in the regular way, after the Board has considered it." Mr. Dunlap then withdrew to allow us to consider it.

Q. If I understand you, in response to an interrogatory propounded to him, Mr. Dunlap did express an opinion that he ought to be entitled to as much as a mucker, and that you objected to that and stated

(Testimony of Charles E. Knox.)

that muckers had to work eight hours a day, and he didn't, and you objected to it; now that is correct, is it?

A. Yes, sir; I don't think that he had done as much work as any one mucker during that time; the fact is, I knew that he had not.

Q. I believe you have already testified that you thought he was a real detriment to the Company; that is correct?

A. I did not make it that sweeping; I said at times, Mr. Summerfield; I have always felt very friendly to Mr. Dunlap, and I didn't have that feeling towards him, that he was a detriment all the time.

Q. At any rate, Mr. Knox, the action taken, contained in the minutes which have been introduced in evidence, met with your approval and sanction, did it not? **[256]**

A. Yes, sir, as a compromise measure.

Mr. SUMMERFIELD.—I move to strike that out as not responsive to the question, a voluntary suggestion of the witness.

The COURT.—I think I will allow the answer to stand.

(By Mr. THAYER.)

Q. Why did you vote for giving him some compensation?

Mr. SUMMERFIELD.—Object to that as calling for a response not evidentiary. It calls for the mental process of the witness.

Objection overruled. Plaintiff excepts on the grounds stated in the objection.

(Testimony of Charles E. Knox.)

A. Because at the time of my affirmative vote on the question I believed that the figures as set forth in Mr. Dunlap's brief as to what he had really accomplished, or as to what had been accomplished in the tax reduction matter, were absolutely correct; and while I thought, as a straight business proposition, we were entitled to a reduction, it was worth something to have it presented, even if the matter settled itself. As far as the damage cases settled and cited, I felt that work was done for the benefit of the Liability Company, not the Montana. Another thing, Mr. Dunlap's brief did not cite the Swope and the Ursin cases at that time; they were not mentioned in his brief; had they been mentioned I could have demonstrated to Mr. Dunlap's satisfaction that I settled them myself; and I voted for the measure as a compromise measure, and wanted to settle the matter without a dispute; I had a personal kindly feeling towards Mr. Dunlap, and a sympathy for his financial condition. **[257]**

[Testimony of W. B. Alexander, for Plaintiff (Recalled).]

Mr. W. B. ALEXANDER, recalled by the plaintiff, testified as follows:

Q. (Mr. THAYER.) I hand you a book marked for identification Defendant's Exhibit "D." Will you state what that book is?

A. It is a book containing a copy of the articles of incorporation of the Montana-Tonopah Mining Company, as well as a copy of the by-laws of the Montana-Tonopah Mining Company.

(Testimony of W. B. Alexander.)

Q. Is that a true copy of the by-laws of the Company? A. It is.

Q. When were those by-laws adopted?

A. I cannot give you the date of the meeting.

Mr. SUMMERFIELD.—I will admit whatever the date is in the minutes is the date.

IT IS ADMITTED that the by-laws of the Montana-Tonopah Mining Company were adopted September 10th, 1907.

Q. Are the by-laws contained in this book, Mr. Alexander, the by-laws which were adopted at the meeting of the Board of Directors on September 10th, 1907?

A. They are. They were prepared by the Company's stenographer and compared by her and myself, as you will see by the notation at the end of the by-laws, where, after the comparison, we both initialed the articles. The only difference between these by-laws and the original copy is in the fact that the original copy named the Copper Company at the head of it, which, when they were presented to me for record, I ran my pen through the name of the Copper Company, and used the stamp of the Montana-Tonopah Mining Company at the head of it; and with that exception those are an exact copy of the original, as the name of the Copper Company had no bearing whatever on the by-laws. [258]

Mr. THAYER.—Do you wish to interrogate the witness any further as to identification?

Mr. SUMMERFIELD.—No.

Mr. THAYER.—The defendant offers in evidence

the first five sections of Article 4 of the By-laws, as referred to in the testimony of Mr. Alexander; section 1 being entitled, Executive Officers; section 2, Subordinate Officers; section 3, Tenure of Office; section 4, the President, and section 5, Vice-President.

Mr. SUMMERFIELD.—I object to the offer upon the ground that it should include the provision in the by-laws of the duties of Secretary and Treasurer of the Company, and of the directors.

Mr. THAYER.—If you will pardon me, I will offer the provisions containing the reference to the directors of the Company, being all of Article 2, entitled the "Board of Directors." I do not offer in evidence any portion of the by-laws relating to the office of Treasurer or Secretary, for the reason that there is no evidence whatever that the plaintiff occupied those offices while these by-laws have been in force, or after they were adopted.

The COURT.—Is that the only objection you have?

Mr. SUMMERFIELD.—All at the present time.

The COURT.—If that is the only objection, it will be overruled and the sections of the by-laws offered will be admitted in evidence.

Mr. SUMMERFIELD.—I ask for the benefit of an exception, if the Court please, upon the ground stated in the objection.

Mr. THAYER.—I will read those portions of the by-laws which have been admitted. (Reads:) **[259]**

[Exhibit—By-laws.]

"ARTICLE 4.

OFFICERS.

"1. Executive Officers. The executive officers of the Company shall be President, two Vice-Presidents, Treasurer and Secretary, all of whom shall be elected annually by the Board. The President and Vice-President must be members of the Board of Directors.

"2. Subordinate Officers. The President may appoint such other officers as he shall deem necessary, who shall have such authority and shall perform such duties as from time to time may be prescribed by the President. The General Manager shall be elected by the Board of Directors. The powers and duties of the Treasurer and Secretary may be exercised and performed by the same person, and who shall not be required to be a director.

"3. Tenure of Office. The tenure of officers of said corporation shall be one year, and until the successors shall be duly elected and shall have duly qualified unless sooner resigned or removed as hereinafter provided, except that when the office of Secretary and Treasurer is held by a person not a director, he shall hold office at the pleasure of the Board of Directors.

"4. The President. The President shall be the chief executive officer of the Company. He shall preside at all meetings of the stockholders or the Board of Directors. He shall have general charge of the business of the Company, and shall sign and

execute all authorized bonds, contracts or other obligations in the name of the Company, and with the Secretary or Assistant Secretary shall sign all certificates of stock for the Company. He shall do and perform such other duties as from time to time may be assigned to him by the Board of Directors or the executive Committee. **[260]**

"5. Vice-President. The Board shall elect two Vice-Presidents. In case of the absence or disability of the President the duties of the office shall be performed by the Vice-Presidents until the Board shall determine otherwise.

ARTICLE 2.
BOARD OF DIRECTORS.

"1. Number. The business and affairs of the Company shall be managed and controlled by a Board of Directors, nine in number.

"2. Term of Office. Each Director shall serve for the term for which he shall have been elected, and until his successor shall have been duly chosen and qualified.

"3. Vacancies. In case of any vacancies among the Directors, through death, resignation, disqualification, or other cause, the remaining directors by affirmative vote of the majority thereof may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of and acceptance by his successor.

"4. Place of meeting. The Directors shall hold their meetings at the office of the Company in the City of Tonopah, Nevada, or at such other place

either within or without the State of Utah as may be from time to time selected.

"5. First meeting of the Board. After the annual election of Directors the newly elected directors shall meet immediately for the purpose of organization, election of officers and the transaction of other business.

"6. Regular Meetings. Regular meetings of the Board of Directors shall be held on the 15th day of each and every month, if not a legal holiday, and if a legal holiday then on the next **[261]** succeeding business day. No notice shall be required to be given of any regular meeting.

"7. Special Meetings. Special meetings of the Board shall be held whenever called by the direction of the President, or of one-third of the Directors for the time being in office.

"8. Notice of Special Meetings. The Secretary shall give notice to each Director of each special meeting, by mailing the same to him at least five days before the meeting, or by telegraphing or telephoning, not later than two days before the meeting. If any director shall be present at any meeting, any business may be transacted without any previous notice.

"9. Quorum. Three of the Directors at the time in office shall constitute a quorum for the transaction of business except where otherwise provided by these by-laws; but a majority of those present at the time and place of any regulation special meeting although less than a quorum, may adjourn the same from time to time without notice, until a quorum be had.

"10. Order of Business. The Board of Directors may from time to time determine the order of business at their meetings. The usual order of business at such meetings shall be as follows: a. Roll call, quorum being present. b. Reading of minutes of the preceding meeting and action thereon. c. Reports of officers. d. Reports of committees. e. Unfinished business. f. Miscellaneous business. g. New business.

"11. Chairman. At all meetings of the Board of Directors the President, or in his absence the Vice-President, or in his absence a Chairman chosen by the Directors shall preside.

"12. Compensation of Directors. For attendance at any meeting of the Board Directors shall receive no compensation but shall receive their actual necessary expenses. **[262]**

"13. Meetings held by consent, without notice. Whenever all the Directors entitled to vote at any meeting shall consent, either by writing on the records of the meeting or filed with the Secretary, or by written or telegraphic consent, or by presence at such meeting and oral consent entered on the minutes, or by taking part in the deliberations at such meeting without objection, the doings of such meeting shall be as valid as if had at a meeting regularly called and noticed, and at such meeting any business may be transacted which is not excepted from the written consent, or to the consideration of which no objection for want of notice is made at the time, and if any meeting be irregular for want of notice or of such consent, provided a quorum was present at such

meeting, the proceedings of said meeting may be ratified and approved and rendered likewise valid and the irregularity or defect therein waived by a writing signed by all the parties having the right to vote at such meeting.

"14. Board may act without meeting by written resolution. The Board of Directors and the executive committee shall, except as provided by law, have power to act in the following manner. A resolution in writing signed by all the members of the Board of Directors or executive committee shall be deemed to be action by such Board or executive committee as the case may be, to the effect therein expressed with the same force and effect as if the same had been duly passed by the same vote at a duly convened meeting, and it shall be the duty of the Secretary of the Company to record such resolutions in the minute book of the Company under its proper date."

Mr. THAYER.—That is all.

The COURT.—Do you rest?

Mr. THAYER.—Yes. **[263]**

Mr. SUMMERFIELD.—If the Court please, in rebuttal I desire to offer in evidence Section 6 of Article 4 of the by-laws, definitive of the duties of the treasurer of the defendant Company, it being first in order. I will make this a separate offer first. It is offered for the purpose of showing by affrmative act of the defendant Company the duties that it imposed upon the treasurer of that Company; regardless of the fact whether at the time of the adoption of these by-laws the plaintiff was the treasurer of the Company at all, but as bearing upon the question

of what the scope of the duties was expected or required of the Treasurer of the Company by the defendant.

Mr. THAYER.—The offer is objected to for the reason that the by-laws were not in force at any time during which the plaintiff was treasurer of the defendant corporation, and for that reason it is irrelevant, immaterial and incompetent as testimony to any of the issues in this case, or any questions arising in the case relative to the duties of the plaintiff while he was acting as Treasurer of the defendant corporation; and as to whether or not any of the duties which he alleges to have performed for the benefit of the corporation were outside of the duties of the treasurer of the corporation; and that the by-law here offered with reference to the duties of such officer has no bearing upon that question; and for the further reason that no presumption exists that the duties of the treasurer of the corporation at two years and a half, or at any time prior to the adoption of the by-laws, were the same as those defined in the by-laws of the corporation.

(Argument.)

The COURT.—It seems to me if it is admissible at all, it is admissible only in rebuttal of Mr. Alexander's testimony as to **[264]** what he did. I will look at the record, and reserve my decision on that matter.

Mr. SUMMERFIELD.—Might it be considered that the same offer is made with respect to subdivision 8 of the same Article, which refers to the Secretary?

Mr. THAYER.—I am willing to let the record show that it is stipulated that the same offer is made of Section 8 of Article 4 on the same grounds; that the same objection is made thereto as made to Section 6 of Article 4, and on the same grounds.

Mr. SUMMERFIELD.—That is satisfactory to me.

IT IS ADMITTED as a fact in this case that the defendant corporation has not filed with the Secretary of State a statement duly authenticated by the signatures of the President and Secretary and verified by each of them, giving the names of the directors, the trustees and officers, with date of election or appointment of each, term of office, residence and postoffice address of each, being the officers and directors elected at the last annual election thereof.

Recess until 1:30 P. M.

AFTERNOON SESSION.

The COURT.—As to the testimony which was offered by Mr. Summerfield from the by-laws of the corporation, I shall sustain the objection; for whatever effect the testimony of Mr. Alexander had, it was testimony as to the custom which existed before the by-laws went into operation; after the by-laws went into operation they could not be contradicted by any custom; and the custom must be considered as relating to the time prior to when the duties were defined by the by-laws themselves, if they were so defined, and I presume they were. That has been stated by counsel repeatedly. **[265]**

Mr. SUMMERFIELD.—I desire to save an exception to the ruling of the Court, assigning as the

ground, the evidence offered is explanatory and not contradictory.

The foregoing is all the evidence adduced at said trial.

Thereupon, at the close of the evidence, the defendant requested the Court to give to the jury the following instructions:

[Instructions Requested by Defendant.]

1.

The jury are instructed to find for the defendant.

2.

The jury are instructed that a single member of a Board of Directors has not any implied power to bind the corporation; nor has any number of members, acting individually, even if they amount to a majority of the Board of Directors; and unless the jury believe from the evidence in this case that the Directors, acting as a Board, employed the plaintiff to render any services for the corporation, at a time prior to which such services were rendered, the plaintiff cannot recover.

3.

The jury are instructed that the plaintiff cannot recover from the defendant for the value of any services rendered for the benefit of the defendant while he was a director of the defendant corporation, if such services were for the general benefit of the corporation.

4.

The jury are instructed that before the plaintiff can recover in this case, it must appear either by its

articles of incorporation, or by some by-law or resolution of the Board of Directors made or passed prior to the performance of such service, that provision **[266]** was made for the payment of compensation to the plaintiff.

5.

The jury are instructed that the plaintiff cannot recover in this case unless it be established by a clear preponderance of evidence: First, that the services, compensation for which is sued for in this action, were clearly outside of his ordinary duties as a director or a Vice-President of the corporation, and also, second, that they were performed under such circumstances as to show that it was well understood by the defendant's officers as well as the plaintiff, that the services were to be paid for by the defendant corporation.

6.

The jury are instructed that the plaintiff cannot recover from the defendant corporation any compensation for services rendered to the corporation as Vice-President of such corporation, if such services were rendered while the President of the corporation was absent, unless provision for such compensation was made prior to the time when such services were rendered.

7.

The jury are instructed that the President of the defendant corporation has presumptively, by virtue of his position, a general right of superintendence over the company's affairs in the interim between meetings of the Board of Directors, and that his

powers are presumptively those of a general manager of the defendant corporation's business, and that in the absence of the President from the place of operations of the defendant company, the plaintiff while Vice-President of the defendant company should perform the services incident to the office of the President without request of the defendant, and without other salary than that received by the President. **[267]**

8.

The jury are instructed that the plaintiff cannot recover compensation for services rendered to the defendant corporation while he was employed by the corporation as the secretary thereof at a fixed rate of compensation, in addition to the compensation provided for by the resolution of the Board of Directors and paid to the plaintiff, even though such services were not anticipated at the time of his appointment, and were not enumerated in the charter or by-laws of the defendant company.

9.

The jury are instructed that the plaintiff, as the Secretary of the corporation, should do without compensation in addition to his usual salary, whatever his employer may have had occasion to employ a Secretary about.

10.

The jury are instructed that the plaintiff in this case relies upon an agreement made between himself and the defendant corporation after the services, the compensation for which he is now suing, were performed; and that such agreement will not support

this action if the services for which he sues were rendered in his capacity as a director, or Secretary or Vice-President.

11.

The jury are instructed that the plaintiff during the time he was receiving a salary from the defendant corporation for certain services cannot recover compensation for other services, where he was not expressly employed by the defendant corporation to render the latter services, and there was no promise to pay; and you are further instructed that the acceptance of such services by the defendant corporation is immaterial. **[268]**

12.

The jury are instructed that the plaintiff as Vice-President of the defendant corporation cannot recover compensation for extra services rendered while he was such Vice-President, while there was no agreement by the defendant corporation to pay him.

13.

The jury are instructed that the plaintiff cannot recover compensation for services rendered in the past if it was never voted him, and if he had on several occasions acted as though nothing were due him from the defendant corporation.

14.

The jury are instructed that if they believe from the evidence the plaintiff did render services beyond those usually rendered by a Vice-President, director, Secretary, or Treasurer of the defendant corporation, and there was no promise upon the part of the defendant to pay therefor; and if you believe from

the evidence that there was no understanding or idea upon the part of the directors of the defendant corporation as a body, that the plaintiff was to receive compensation for such services, the plaintiff cannot recover.

15.

The jury are instructed that if they should find from the evidence that the plaintiff rendered services for the benefit of the defendant corporation, such fact does not, in itself, make the defendant liable to compensate the plaintiff therefor, but before the jury can find for the plaintiff, they must also find that the defendant corporation, as a corporation, knew or believed that the plaintiff expected to be compensated for such services. **[269]**

16.

The jury are instructed that the portion of the resolution adopted at the meeting of the Board of Directors of the defendant corporation on February 15th, 1910, is not binding upon the defendant corporation as obligating the defendant corporation in any sense to compensate the plaintiff for any services which may have been rendered.

17.

The jury are instructed that if they find from the evidence that the defendant company had no by-laws during the period while plaintiff was Secretary and Treasurer of such corporation, and if they find from the evidence that there was no agreement between the defendant corporation and the plaintiff as to what services the plaintiff should perform as Secretary and Treasurer of said corporation, the plain-

tiff is presumed to perform, while in the occupancy of that office, such services as are ordinarily performed by such officer of other corporations, under similar circumstances, in the community where such services are rendered.

18.

The jury are instructed that the plaintiff cannot recover compensation for any services claimed to have been rendered prior to February 15th, 1910.

[270]

(At the conclusion of the argument the Court instructed the jury as follows:)

[Instructions.]

The COURT.—This action was brought by Mr. Dunlap to recover a judgment against the Montana-Tonopah Mining Company. Mr. Dunlap claims to have rendered services as Secretary and Treasurer of the company, services as director and Vice-President of the company, and finally, services which were nonofficial; that is, services beyond the scope and range of his official duty as Secretary and Treasurer, or as Vice-President and director of the company.

As to the first class of services there is here no question raised. The plaintiff was duly elected Secretary and Treasurer of the company; his salary was fixed by agreement; he performed the duties of the two offices until the date of his resignation; and it is admitted that he has been fully paid for his services.

As to the second class of services, to wit, those devolving upon plaintiff which he performed by reason of the fact that he was a Vice-President and a director of the company, it does not appear from the tes-

timony that there was any agreement, understanding, or resolution by the Board of Directors fixing any compensation, nor has any provision of the by-laws or of the articles of incorporation of the Montana-Tonopah Mining Company been offered in evidence, which directs that compensation shall be paid to the Vice-President or to a director for their official services. For such official services, however well they may have been performed, however valuable they may have been to the Company, the plaintiff cannot recover. It is a well established rule of law that in the absence of a governing statute, a by-law, a resolution or a contract, made and assented to by the corporation at large, a director is not entitled to claim any compensation for official services. **[271]** Whatever is done by a director or by a Vice-President who is a director, in the line of his official duties; or whatever may fairly be deemed incidental to his official duties, and to have been undertaken by him by virtue of his office, is presumed to have been done gratuitously. The law does not raise or imply a promise to pay for such services, although rendered to the corporation by request. The danger of abuse is so great in admitting the principle that a director, or a director serving as a Vice-President, can recover compensation for services rendered while he is a director, that it has been held that he is not entitled to, and cannot recover such compensation unless it appears, first, that the services are unquestionably outside of and beyond the range of his official duties as Vice-President and director; and, second, that they were rendered under such cir-

cumstances as raise an implied promise on the part of the company to pay therefor.

It will therefore be improper for you to allow plaintiff anything for his services rendered within the line and scope of his duty as a director and Vice-President of the corporation.

These considerations lead us to the third class of services which are claimed to have been performed by the plaintiff for defendant, and which he contends were beyond the range of his official duties, either as Secretary and Treasurer, or as director or Vice-President. Here you must bear in mind that the burden is on the plaintiff to prove by a preponderance of the evidence that the services for which he seeks to recover were clearly outside of and beyond the range of his official duties. While the burden to prove this rests upon the plaintiff, you will ascertain that fact, if it be a fact, by a consideration of all the testimony **[272]** in the case, whether it be offered by the plaintiff or by the defendant. In segregating unofficial from official services, you will consider all the testimony in the case. Official services will include not only official acts, but everything which is necessarily done in the discharge of an official duty, or which is incidental thereto. On the other hand, services which are not required by law, or by a rule of the corporation, or by a custom of the corporation to be performed by a director, or by an officer who must be a director—services which can be performed by an agent, who is not, and need not be a director, are services for which compensation may be recovered, if the company has expressly or

impliedly promised to pay therefor, provided the services are valuable.

If you find that during the period mentioned in the complaint Mr. Dunlap performed valuable services for the defendant, which were not within the line of his official duty, your next inquiry will be as to whether such services were rendered under an express agreement to pay therefor, or under such circumstances that a promise to pay naturally arises.

There is no evidence tending to show any express agreement to pay any fixed or stipulated sum for such services, though there has been read in your hearing, from the minutes of the Board of Directors of the Corporation for February 15th, 1910, a recital to the effect that it is the sense of the corporation that the plaintiff should be allowed some compensation for services therein mentioned. The fact that this admission was made after the performance of the acts mentioned, rather than before, does not detract from its efficiency as an admission of the fact that the directors then present stated that the services mentioned in the resolution were without the scope of the official duty of Mr. **[273]** Dunlap; nor does it detract from this as an admission that at the time the resolution was passed, these directors regarded the services not as gratuitous.

I am requested by the defendant to instruct you that "the portion of the resolution adopted at the meeting of the Board of Directors," to which I have just referred, "is not binding upon the defendant corporation as obligating the defendant corporation in any sense to compensate the plaintiff for any ser-

vices which may have been rendered." That is true, but the matter admitted in evidence may be considered by you in determining what was the understanding of the Board of Directors as to whether the services mentioned were within or without the scope of Mr. Dunlap's official duties as Secretary and Treasurer, or as director and Vice-President.

It does not necessarily follow from the fact that a director performed extra-official labors for the corporation, that he is entitled to pay therefor, unless there is some express or implied agreement to that effect. If there be an express understanding to pay, but the amount is undetermined, and is not stipulated, the law raises an implication and a promise to pay, not necessarily all that is asked, nor, on the other hand, no more than is conceded, but it raises a promise to pay the reasonable value of the services; that is, what is just and what is right.

If you find that valuable nonofficial services as I have defined them, were performed without any express agreement, and with the knowledge on the part of the corporation, that is, with the knowledge of its officers; and if you also find that the benefits of such services were appropriated or retained by the corporation, and that it was known by the corporation that the services were [274] not being rendered gratuitously, but that Mr. Dunlap expected and intended to be paid therefor, then you would be justified in finding the existence of an implied contract to pay what the services were reasonably worth.

You are instructed, at the request of the defendant, that "the plaintiff cannot recover from the de-

fendant for the value of any services rendered for the benefit of the defendant, while he was a director of the defendant corporation, if such services were for the general benefit of the corporation." This, however, you will understand in the light of the instructions already given; that is, if the services were rendered within the scope of Mr. Dunlap's official duty.

"The plaintiff cannot recover in this case, unless it be established by a clear preponderance of evidence, first, that the services, compensation for which is sued for in this action, were clearly outside of his ordinary duties as director or Vice-President of the corporation; and also, second, that they were performed under such circumstances as to show that it was understood by the defendant's officers, as well as the plaintiff, that the services were to be paid for by the corporation."

Now, this is true, but in determining whether there was an understanding that these services were not gratuitous, you are entitled to consider all the circumstances in the case, whatever was said and whatever was done, bearing on that question, and to ascertain thus what the conditions actually were, and what the understanding was, and whether this defendant should have known, or did know, that the services were not intended to be gratuitous.

"The jury are instructed that the plaintiff, as the Secretary of the corporation, should do without compensation in addition to [275] his usual salary, whatever his employer may have had occasion to employ a Secretary about."

This is true, provided he was not employed about anything except his official duties. If he was employed in other services than those which were embraced within his duty as Secretary and Treasurer, and which were not contemplated at the time by the parties when he was employed, then you could not regard such services as gratuitous.

"The jury are instructed that if they believe from the evidence the plaintiff did render services beyond those usually rendered by a Vice-President, Director, Secretary or Treasurer of the defendant corporation, and there was no promise on the part of the defendant to pay therefor; and if you believe from the evidence that there was no understanding or idea upon the part of the directors of the defendant corporation as a body that the plaintiff was to receive compensation for such services, the plaintiff cannot recover."

That will be understood with the same instructions I have given you before; you are at liberty to infer, if you find it proven by a preponderance of evidence, that these services were not intended as a gift.

"The jury are instructed that if they should find from the evidence that the plaintiff rendered services for the benefit of the defendant corporation, such fact does not, in itself, make the defendant liable to compensate the plaintiff therefor, but before the jury can find for the plaintiff they must also find that the defendant knew or believed that the plaintiff expected to be compensated for such services." **[276]**

That is in line with the same instructions which have been given you heretofore.

"The jury are instructed that if they find from the evidence that the defendant company had no by-laws during the period while the plaintiff was Secretary and Treasurer of such corporation, and if they also find from the evidence that there was no agreement between the defendant corporation and the plaintiff as to what services the plaintiff should perform as Secretary and Treasurer of said corporation, the plaintiff is presumed to perform while in the occupancy of that office such services as are ordinarily performed by such officer of a mining corporation under similar circumstances in the community where such services are rendered."

Now, some testimony has been offered here tending to show what the custom and usage was governing the duties that pertain to the office of Secretary and Treasurer. You will understand that testimony with this instruction: in the absence of any rule of the company, of any law, or of any stipulation in any contract, regulating, describing and specifying what such services are, you may look to this custom; but in order to bind the plaintiff, Mr. Dunlap, by such custom, it must be shown that he understood, when he entered into the contract, what his duties were as defined by this custom, whatever it may be.

Now, gentlemen, it is needless for me to advise you and instruct you that you are bound to consider no other evidence except that which has been introduced on this witness-stand; and that you are also bound to take the law as it is given you by the Court. If I have erred, it is my error, and for it I alone am re-

sponsible. But as to the facts, as to the credibility of the **[277]** witnesses, and as to the weight to be attached to their statements on the witness-stand, you are the triers, and you are the exclusive judges. It rests with you to say what has been proven; to say what testimony is true and what testimony is false. If I have expressed in any way my impression as to this case, or my attitude toward any evidence which has been offered, you are to disregard any such suggestion. You are to remember that as to the facts you are bound under your oath to have consideration only to your own judgment. Whatever may have been the opinion of counsel or of the Court as to what is proven by the testimony, it is only an opinion, to you it is merely advisory, and you must rely upon your own judgment as to what is proven by the testimony in this case.

There are conflicts in the testimony; you are to consider them and you are also to determine what the real fact is in such controversies. You will determine the credibility of the witnesses very much as you do in the ordinary affairs of life. You will observe the manner of each witness on the witness-stand, whether he gives his testimony frankly and openly, with an evident desire to tell the whole truth, just as it is, and nothing but the truth, or whether his answers are evasive and contradictory. You will note whether he is prejudiced against one side, or biased in favor of the other; you will consider whether his statements are contradicted or corroborated by other evidence in the case. If you are satisfied that a wit-

ness has come upon the witness-stand with the deliberate intention to deceive you, you may examine all his testimony with caution; and you are at liberty to disregard it if your judgment so dictates. If you are satisfied that a witness has willfully stated an untruth as to a material matter in the **[278]** case, you are at liberty to disregard the whole or any portion of his testimony, save where it is corroborated by other credible evidence admitted in the case. But if a witness has come upon this witness-stand and stated that which is untrue, and you are satisfied under all the circumstances that he is simply mistaken, that there was no purpose to deceive you, you should not disregard his testimony, but you would be warranted in scanning it more closely in order to determine its accuracy. In this manner you will determine the credibility of each witness, and the weight which is to be given his testimony.

You will remember throughout the entire consideration of the case that the plaintiff must prove the facts which are necessary to establish his cause, by a preponderance of the evidence. By a preponderance of the evidence is meant that evidence which, after consideration of all the testimony, is entitled to the greater weight. It is such evidence as when weighed with that opposed to it has the more convincing force. You are not bound to find a verdict in accordance with the greater number of witnesses. If, in the light of these instructions, and from the evidence, you find that plaintiff has performed services for which the defendant corporation, either by express

agreement or by implied understanding, has promised to pay, it will then be your duty to award plaintiff the reasonable value of such services; and you will still remember that you can only award such reasonable value as is shown by a preponderance of evidence. In doing this you will, if you allow anything, fix a sum which is fair and just and reasonable. There is no room here for sentiment or for sympathy; it is merely a question of fixing a compensation, neither too much on the one hand, nor too small on the other; and which shall be a just **[279]** compensation for the nonofficial services rendered, as shown by the evidence, if it is shown. You are to look at this case with reference to the rights of both parties, and you are to be just and fair to each.

Now, gentlemen, I leave this case with you. The bailiff will hand you two forms of verdict, and when you have elected your foreman and agreed upon your verdict, the foreman will sign the verdict, you will notify the Marshal, and you will be brought into court. It takes twelve of your number to find a verdict.

[Proceedings Had Subsequent to Instructions, Exception, etc.]

The COURT.—Now, gentlemen, have you any exceptions you wish to take?

Mr. SUMMERFIELD.—If the Court please, I am satisfied with the instructions as given.

Mr. THAYER.—Your Honor, there is one instruction, or a portion of the instruction, in which reference is made to a recital of the minutes of February

15th, 1910, as to the character of that testimony. I could not hear what your Honor said.

The COURT.—Well, I don't know that I can repeat exactly what I did say; but I said the fact that that occurrence was subsequent to the performance of these alleged services could not detract from its efficiency as an admission of fact; that is, as an admission that these services recited in the resolution itself were, in the opinion of the Board at the time, non-official duties, outside of and beyond the scope of Mr. Dunlap's duty as Secretary and Treasurer, or as director and Vice-President. And I think there was also a statement to the effect that it could not detract from that as an admission on the part of those directors present that at that time they believed the services were not gratuitous. **[280]**

Mr. THAYER.—That is what I understood, at the time of the adoption of the resolution.

The COURT.—At the time of the adoption of the resolution.

Mr. THAYER.—And there was another reference to services of one employed as the agent of a corporation, as fixing the line of performance of duties outside of the official duties.

The COURT.—Well, perhaps I had better state what I mean instead of reading the instruction over again. I meant by that simply this: That whatever services are rendered by a director or a Vice-President, within the line of his official duty, or which are necessary in the performance of his official duty, or which are incidental to the performance of his official

duty, must be regarded as rendered gratuitously, and he cannot recover for them without an express contract entered into before the services were rendered; but for such services as are not required of an officer, either by law or by any by-law of the corporation, or by any rule of the corporation, and which can be performed by an agent or by a servant or by an attorney, who need not be a director and who is not a director, these may be considered as nonofficial duties, and as duties beyond the scope of the employment of the officer.

Mr. THAYER.—And can be recovered for, did your Honor state that?

The COURT.—No; they can be recovered for under the conditions given in the other instructions. This instruction was not followed by any statement that they could be recovered for; they were simply defined as being extra-official or nonofficial duties.

Mr. THAYER.—Perhaps I am over-nice about the wording, but I would like the benefit of an exception to that instruction. [281]

The COURT.—Please give your reason.

Mr. THAYER.—For the reason it does not correctly state the law, as I understand it.

The COURT.—Well, the purpose for which these exceptions are asked before the jury goes out, is in order that counsel may put their finger precisely on the point they object to and explain it to the Court, so if it is error the Court can correct it. Now, if you simply say these instructions are all contrary to the law, you may be right, but I don't know in what re-

spect. If you will indicate just in what regard the instruction is wrong, I will correct it, if I think proper.

Mr. THAYER.—Well, along the line that was developed in the argument before the jury came in; whether or not the services rendered by a person who happens at that time to occupy an office in a corporation, are without the scope of his official activities he cannot recover therefor, unless the corporation itself had actual knowledge that he intended to claim compensation, and that the corporation intended to pay him. I think that was fully discussed, and the exception was asked merely to cover that.

The COURT.—Very well, that may be given as the exception. I have stated my views on that in the other instruction, and I think I have stated them three or four different times; I have read nearly every instruction you offered on that point, and made some comments; some of them I have given precisely as you offered them. Instructions 1, 2, 4, 6, 7, 8, 10, 11, 12, 13 and 18 have been refused. Some of them because they did not correctly express the law, in my opinion, and others because I had already given an expression of the same principle in my instructions.

Mr. THAYER.—For the purposes of the record, may I have a general **[282]** exception to the refusal of the instructions which were not granted?

The COURT.—To the instructions I have enumerated, those are the only ones I am aware that I have refused, those I have numbered.

Mr. THAYER.—The exception is taken to the re-

fusal of the Court to grant such of the defendant's instructions asked for as were declined.

The COURT.—To those instructions?

Mr. THAYER.—Yes.

[Exceptions to Verdict.]

Thereupon the jury retired to consider of their verdict, and returned into court with the following verdict, to wit:

"We, the jury in the above-entitled cause, find for the plaintiff in the sum of $7,500.00.

C. E. MERRICK,
Foreman."

Sept. 24, 1910.

Mr. THAYER.—If your Honor please, I would like an exception to the verdict.

The COURT.—The exception may be entered.

And now comes the defendant and presents this his proposed bill of exceptions, and prays that the same may be allowed and made a part of the record in this action.

RUFUS C. THAYER,
Attorney for Defendant. **[283]**

Due and legal service of the above and foregoing, by copy, is hereby admitted, this —— day of November, A. D. 1910.

————,
Attorneys for Plaintiff.

[Order Re Motion for a New Trial and Settling Bill of Exceptions.]

The motion of defendant for a new trial herein was, after argument by counsel for and against the mo-

tion, respectively, and after due consideration by the Court, on the 17th day of July, 1911, overruled; and now, in furtherance of justice and that right may be done, the defendant, The Montana-Tonopah Mining Company, tenders and presents the foregoing as its Bill of Exceptions in this case to the action of the Court, and prays that the same may be settled and allowed, and signed and sealed by the Court, and made a part of the record hereof; and the same is accordingly done this 31st day of July, A. D. 1911.

E. S. FARRINGTON,
Judge. **[284]**

In the Circuit Court of the United States for the Ninth Circuit, District of Nevada.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Petition for Writ of Error.

Now comes The Montana-Tonopah Mining Company, the defendant herein, and says that on or about the —— day of ————, and within the present term of this court, said Court entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which

will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of error so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

RUFUS C. THAYER,
Attorney for Defendant.

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Petition for Writ of Error. Filed July 31, 1911. T. J. Edwards, Clerk. Rufus C. Thayer, Attorney for Defendant, 1209 Addison Head Building, San Francisco. **[285]**

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled action and files the following assignment of errors upon which it relies for its prosecution of the writ of error in said action:

I.

The Court erred in the admission of evidence of the plaintiff over the defendant's objection as to what services plaintiff rendered to the defendant Company prior to February 15, 1906, at which time the statute of limitation began to run for the purposes of this action. (Tr. 4 to 5.)

II.

The Court erred in the admission of evidence of the plaintiff over the defendant's objection that Charles E. Knox told plaintiff that he, the said Knox, proposed to see that plaintiff's services would be properly compensated for at some future time, for the reason that it does not appear that the said Knox was properly authorized to make any such agreement with plaintiff, and that the evidence so elicited is as to an agreement with Charles E. Knox and not with the defendant corporation. (Tr. 46.)

III. **[286]**

The Court erred in the admission of the plaintiff's evidence over defendant's objection as to the value of services in the Tonopah Mining District, State of Nevada, without limiting that the value of such services were identical to those concerning which plain-

tiff testified. (Tr. 47 to 48.)

IV.

The Court erred in sustaining plaintiff's objection to the question propounded to the plaintiff on cross-examination that the defendant suggested to plaintiff that he should not move his office with those of the Company at the time the Company's offices were removed from the Town of Tonopah up to the mine. (Tr. 54.)

V.

The Court erred in sustaining plaintiff's objection to the admission of a portion of the minutes of a meeting of the Board of Directors of the defendant relating to authorizing the settlement of the case of Swope against the Company to recover for personal injuries. (Tr. 58.)

VI.

The Court erred in overruling defendant's motion at the close of plaintiff's case in chief and before the charge to the Jury was given to direct the Jury to find for the defendant upon the following grounds:

(1) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the Company.

(2) The testimony fails entirely to show that the corporation or [287] its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to

compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That the plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant, excepting of those of Secretary and Treasurer of defendant corporation, which last services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation, and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all, they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation, [288] and under circumstances similar to those

carried on by the defendant in this action.

VII.

The Court erred in overruling defendant's motion at the close of plaintiff's case in chief for a judgment of nonsuit for the following reasons (Tr. 109):

(1) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That the plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant, excepting those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the **[289]** plaintiff claims to have been

rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by the plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all, they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

VIII.

The Court erred in sustaining an objection to the testimony of witness W. B. Alexander as to what was the assessed valuation of defendant's property in Nye County, Nevada, for the year 1907. (Tr. 141 to 142.)

IX.

The Court erred in sustaining an objection to the testimony of Charles E. Knox as to whether or not he had received any salary as the President of defendant corporation, and as to whether or not he had ever received any salary as President of defendant corporation during the time which plaintiff claims to have rendered services to [290] the said corporation as Vice-President thereof. (Tr. 193 to 195.)

X.

The Court erred in admitting as evidence over defendant's objection that portion of the resolution set forth in the minutes of a meeting of the Board of Directors of defendant Company shown on page 106 of defendant's minute-book, beginning at line six therein and ending at line twenty-five therein, reading as follows:

"Whereas at times during the past five years it has been necessary to call upon Vice-President Dunlap to perform in cases of emergency duties other than those usually designated as the duties of Vice-President, such as the exercise of his good offices in behalf of the Company in case of accident to employees of this Company, more particularly in the case of John Mitchell, S. Merton and others; his efforts in behalf of the Company in securing a reduction of taxes on the properties of this Company, more particularly the taxes for the year 1907, when the tax against the mill was $3,450, which through Mr. Dunlap's efforts was reduced $862.50, thereby effecting a saving of $2,587.50, and at the same time a reduction of $5,875 in the assessed valuation of the surface improvements, resulting in a saving of $202.88, and the separate listing of the railroad spur, effecting a saving of $78.09."

XI.

The Court erred in admitting in evidence over defendant's objection that portion of a resolution set forth in the minutes of a meeting of the Board of Directors of defendant Company adopted February 15, 1910, reading as follows:

"It is the sense of this Board that Mr. Dunlap is entitled to some **[291]** compensation for the services rendered in these matters."

XII.

The Court erred in refusing to give the following special instruction requested by the defendant:

"3. The jury are instructed that the plaintiff cannot recover from the defendant for the value of any services rendered for the benefit of the defendant while he was a director of the defendant corporation, if such services were for the general benefit of the corporation."

XIII.

The Court erred in refusing to give the following special instruction requested by the defendant:

"4. The jury are instructed that before the plaintiff can recover in this case, it must appear either by its Articles of Incorporation, or by some by-law or resolution of the Board of Directors made or passed prior to the performance of such service, that provision was made for the payment of compensation to the plaintiff."

XIV.

The Court erred in refusing to give the following special instruction requested by the defendant:

"13. The jury are instructed that the plaintiff cannot recover compensation for services rendered in the past if it was never voted him, and if he had on several occasions acted as nothing were due him from the defendant corporation."

XV.

The Court erred in refusing to give the following

special instruction [292] requested by the defendant:

"14. The jury are instructed that if they believe from the evidence the plaintiff did render services beyond those usually rendered by a Vice-President, Director, Secretary, or Treasurer of the defendant corporation, and there was no promise on the part of the defendant to pay therefor; and if you believe from the evidence that there was no understanding or idea upon the part of the directors of the defendant corporation as a body, that the plaintiff was to recover compensation for such services, the plaintiff cannot recover."

XVI.

The Court erred in refusing to give the following special instruction requested by the defendant:

"17. The jury are instructed that if they find from the evidence that the defendant company had no by-laws during the period while plaintiff was Secretary and Treasurer of such corporation, and if they find from the evidence that there was no agreement between the defendant corporation and the plaintiff as to what services the plaintiff should perform as Secretary and Treasurer of said corporation, the plaintiff is presumed to perform while in the occupancy of that office such services as are ordinarily performed by such officer of other corporations, under similar circumstances, in the community where such services are rendered."

XVII.

The Court erred in refusing to give the following special instruction requested by the defendant:

"18. The jury are instructed that the plaintiff cannot recover **[293]** compensation for any services claimed to have been rendered prior to February 15th, 1907."

XVIII.

The Court erred in charging the jury as follows:

"Now, some testimony has been offered here tending to show what the custom and usage was governing the duties that pertain to the office of Secretary and Treasurer. You will understand that testimony with this instruction: in the absence of any rule of the company, or any law, or of any stipulation in any contract, regulating, describing and specifying what such services are, you may look to this custom; but in order to bind the plaintiff, Mr. Dunlap, by such custom, it must be shown that he understood, when he entered into the contract, what his duties were as defined by this custom, whatever it may be."

XIX.

The Court erred in charging the jury as follows:

"That whatever services are rendered by a director or a vice-president, within the line of his official duty, or which are necessary in the performance of his official duty, or which are incidental to the performance of his official duty, must be regarded as rendered gratuitously, and he cannot recover for them without an express contract entered into before the services were rendered; but for such services as are not required of an officer, either by law or by any by-law of the corporation, or by any rule of the corporation, and which can be performed by an agent or by a servant or by an attorney, who need not be

a director and who is not a director, these may be considered as nonofficial duties, and as duties beyond the scope of the employment [294] of an officer."

XX.

That the damages awarded by the verdict of the jury are excessive.

XXI.

That the verdict of the jury is contrary to law for the following reasons:

(1) That the damages awarded by the jury are excessive.

(2) That testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the Company.

(3) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(4) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(5) That the plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant, excepting of those of Secre-

tary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for **[295]** which defendant had previously paid the plaintiff.

(6) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(7) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segragated and were such services as were usually rendered by officers of directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

XXII.

That the verdict of the jury is not sustained by the evidence for the following reasons:

(1) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the Company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believes that plaintiff was **[296]** rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant excepting of those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all

they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant [297] corporation and under circumstances similar to those carried on by the defendant in this action.

XXIII.

That the Court erred in charging the jury as in this assignment of error set forth, and that said charges were erroneous, confusing, misleading and inconsistent, for the reason

That the Court erred in charging the jury in one instance as follows:

"In segregating unofficial from official services you will consider all the testimony in the case"; and also at a later time as follows: "There has been read in your hearing from the minutes of the Board of Directors of the corporation for February 15th, 1910, a recital to the effect that it is the sense of the corporation that the plaintiff should be allowed some compensation for services therein mentioned. The fact that this admission was made after the performance of the acts mentioned rather than before does not detract from its efficiency as an admission of the fact that the Directors then present stated that the services mentioned in the resolution were without the scope of the official duty of Mr. Dunlap; nor does it detract from this as an admission that at the time the resolution was passed these Directors regarded the services not as gratuitous."

Wherefore the defendant prays that such judgment may be reversed.

RUFUS C. THAYER,
Attorney for Defendant.

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Assignment of Errors. Filed July 31, 1911. T. J. Edwards, Clerk. Rufus C. Thayer, Attorney for Defendant, 1209 Addison Head Building, San Francisco. **[298]**

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 1117.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Bond on Writ of Error [Filed August 4, 1911].

Know All Men by These Presents, that we, The Montana-Tonopah Mining Company, a corporation, created and existing under and by virtue of the laws of the State of Utah, as principal, and F. M. Lee and H. G. Humphrey, as sureties, are held and firmly bound unto R. P. Dunlap, the plaintiff above named, in the sum of Ten Thousand ($10,000.00) Dollars, to

be paid to the said R. P. Dunlap, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 31st day of July, A. D. 1911.

Whereas, the above-named defendant has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the judgment rendered in the above-entitled cause by the Circuit Court of the United States, Ninth Circuit, District of Nevada.

Now, therefore, the condition of the above obligation is such that if the above-named The Montana-Tonopah Mining Company shall prosecute said writ to effect, and answer all costs and damages if they shall **[299]** fail to make their plea good, then the above obligation shall be void; otherwise to remain in full force and virtue.

In Witness Whereof the said The Montana-Tonopah Mining Company, a corporation, has hereunto caused its corporate name to be signed by its President and its corporate seal to be affixed and attested by its Secretary, and the said sureties have hereunto

set their hands and seals the day and year hereinabove written.

[Seal] THE MONTANA-TONOPAH MINING COMPANY.

By CHAS. E. KNOX,
President.

Attest: W. B. ALEXANDER,
Secretary.

F. M. LEE.
H. G. HUMPHREY.

State of Nevada,
County of Washoe,—ss.

F. M. Lee and H. G. Humphrey, being first duly sworn, deposes and says, each for himself and not for the other, that they are the sureties whose names are signed to the foregoing bond or undertaking, and that they and each of them are freeholders within the said State and District of Nevada, and are worth more than the sum of $20,000.00 **[300]** in property situate within the State of Nevada, above all of their just debts and liabilities, exclusive of property exempt from execution.

F. M. LEE.
H. G. HUMPHREY.

Subscribed and sworn to before me this 3d day of August, A. D. 1911.

[Seal] JOHN D. CAMERON,
Notary Public.

The foregoing undertaking is approved and will operate as a supersedeas.

August 4, 1911.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Bond on Writ of Error. Filed August 4th, 1911. T. J. Edwards, Clerk. Rufus C. Thayer, Counsellor at Law, 1209 Addison Head Building, San Francisco. **[301]**

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 1117.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Bond on Writ of Error [Filed August 11, 1911].

Know All Men by These Presents, that we, The Montana-Tonopah Mining Company, a corporation, created and existing under and by virtue of the laws of the State of Utah, as principal, and F. M. Lee and H. G. Humphrey, as sureties, are held and firmly bound unto R. P. Dunlap, the plaintiff above named, in the sum of Ten Thousand ($10,000.00) Dollars, to be paid to the said R. P. Dunlap, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 11th day of August, 1911.

Whereas, the above-named defendant has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the judgment rendered in the above-entitled cause by the Circuit Court of the United States, Ninth Circuit, District of Nevada.

Now, therefore, the condition of the above obligation is such that if the above named The Montana-Tonopah Mining Company shall prosecute said writ to effect, and answer all costs and damages, and pay said judgment if they shall fail to make their plea good, then the above obligation shall be void; otherwise to remain in full force and virtue. **[302]**

In Witness Whereof the said The Montana-Tonopah Mining Company, a corporation, has hereunto caused its corporate name to be signed by its 2d Vice-President and its corporate seal to be affixed and attested by its Secretary, and the said sureties have hereunto set their hands and seals the day and year hereinabove written.

[Seal] THE MONTANA-TONOPAH MINING COMPANY.

By THOMAS J. LYNCH,
2nd Vice-President.

Attest: W. B. ALEXANDER,
Its Secretary.

F. M. LEE.

H. G. HUMPHREY.

State of Nevada,
County of Washoe,—ss.

F. M. Lee and H. G. Humphrey, being first duly sworn, deposes and says, each for himself and not for the other, that they are the sureties whose names are signed to the foregoing bond or undertaking, and that they and each of them are freeholders within the said State and District of Nevada, and are worth more than the sum of $20,000.00 in properly situate within the State of Nevada, above all of their just debts and liabilities, exclusive of property exempt from execution.

F. M. LEE.
H. G. HUMPHREY. **[303]**

Subscribed and sworn to before me this 11th day of August, A. D. 1911.

[Seal] JOHN D. CAMERON,
Notary Public.

The foregoing undertaking is approved August 11th, A. D. 1911.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Bond on Writ of Error. Filed August 11th, 1911. T. J. Edwards, Clerk. Rufus C. Thayer, Attorney for Defendant, 1209 Addison Head Building, San Francisco.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error.

On this 31st day of July, 1911, came the defendant by its attorney and filed herein and presented to the Court its petition praying for the allowance of a writ of error and assignment of errors, intended to be [304] urged by said defendant, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit and such other and further proceedings may be had as may be proper in the premises; on consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $10,000, which shall operate also as a supersedeas bond.

E. S. FARRINGTON,
Judge United States Circuit Court.

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah

Mining Company, a Corporation, Defendant. Order Allowing Writ of Error. Filed July 31, 1911. T. J. Edwards, Clerk. Rufus C. Thayer, Attorney for Defendant, 1209 Addison Head Building, San Francisco. **[305]**

[Opinion.]

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 1117.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

McINTOSH & COOKE and SUMMERFIELD & CURLER, for Plaintiff.

Mr. RUFUS C. THAYER, for Defendant.

FARRINGTON, District Judge. Plaintiff brings this action to recover the sum of $20,500, a balance alleged to be due for services rendered between January 15th, 1903, and February 15th, 1910.

Plaintiff was Secretary-Treasurer of defendant Company from January 15th, 1903, to October 15th, 1903, at a salary of $150 per month; and from the latter date until he resigned, February 21, 1905, at $200 per month; this salary has been fully paid. From September 8, 1903, to February 15, 1910, he was a director; and from September 11, 1906, he was also a Vice-President of said Company.

Defendant denies that Dunlap "has performed any services excepting those incidental to the office of Secretary-Treasurer * * * for which he has been fully paid and compensated, and excepting those incident and properly belonging to the offices of a director or Vice-President of said corporation usually legally and duly performed by such officers without compensation."

The jury brought in a verdict in favor of plaintiff for $7,500. **[306]** A new trial is asked because the verdict is alleged to be excessive, and not supported by the evidence, and because the Court erred in the admission of evidence, and in giving and refusing instructions to the jury.

Plaintiff offered minutes of the Board of Directors, dated February 15, 1910, reciting certain services rendered by Mr. Dunlap "other than those usually designated as the duties of Vice-President," and declaring it to be the sense of the "Board that Mr. Dunlap is entitled to some compensation for the services rendered in these matters," and concluding with a resolution that the Secretary-Treasurer of this company be and he hereby is instructed to pay R. P. Dunlap the sum of $1,000 out of the funds of this company."

The Court excluded the instruction to the Secretary-Treasurer, and admitted that portion of the resolution which reads as follows:

"Whereas at times during the past five years it has been necessary to call upon Vice-President Dunlap to perform in cases of emergency duties other than those usually designated as the duties of Vice-

President, such as the exercise of his good offices in behalf of the company in case of accident to employees of this company, more particularly in the case of John Mitchell, S. Merton and others; his efforts in behalf of the company in securing a reduction of taxes on the properties of this company, more particularly the taxes for the year 1907, when the tax against the mill was $3,450, which through Mr. Dunlap's efforts was reduced $862.50, thereby effecting a saving of $2,587.50, and at the same time a reduction of $5,875 in the assessed valuation of the surface improvements, resulting in a saving of $202.88, and the separate listing of the railroad spur, effecting a saving of $78.09, it is the sense of this Board that Mr. Dunlap is entitled to some compensation for the service rendered in these matters."

It is apparent that there was an effort to compromise, and that the resolution, in so far as it fixed Mr. Dunlap's compensation at $1,000, was an offer on the part of the corporation to settle with plaintiff. The resolution, as admitted, was no more than an admission **[307]** by the Board of Directors that plaintiff had rendered certain extra-official services, for which he was entitled to some compensation. These were clearly admissions of fact, made because defendant believed them to be true.

"The admission of any distinct fact made *eo animo* is competent, though made in the course of proceedings for compromise."

2 Chamberlayne on Evidence, Sec. 1452;

2 Wigmore on Evidence, Sec. 1061;

Harrington v. Lincoln, 64 Am. Dec. 95;

Snodgrass v. Branch Bank at Decatur, 60 Am. Dec. 505;

Illinois Central R. R. Co. v. Manion, 101 Am. St. Rep. 345;

Brice v. Bauer, 2 Am. St. Rep. 454.

If Mr. Dunlap rendered services to the corporation within the scope of his duties as director or Vice-President, before he can recover therefor, he must prove an express contract of employment with an agreement for compensation. If he rendered services which were outside the scope of his official duty as Vice-President or director, he is entitled to recover therefor upon an implied promise, if such a promise can be inferred from the facts and circumstances in evidence.

I am aware that many respectable authorities hold that an officer of a corporation cannot recover for services, whether official or extra-official, in the absence of prior express contract, but I am unable to yield my assent to such a doctrine. The weight of authority seems to be with the more liberal rule.

Ruby Chief M. & M. Co. v. Prentice, 52 Pac. 210;

Santa Clara Mining Association v. Meredith, 33 Am. Rep. 264; **[308]**

Corinne M. C. & Stock Co. v. Toponce, 152 U. S. 405;

Ten Eyck v. Pontiac R. R. Co., 3 L. R. A. 378;

Huffaker v. Germania Safety Vault & Trust Co., 46 L. R. A. 384;

Severson v. Bimetallic Extension M. & M. Co., 44 Pac. 79.

Mr. Dunlap's efforts to settle accident cases in

which defendant was involved, and also to secure a reduction of defendant's taxes, were not, strictly speaking, official duties; they were services which might very properly have been, and usually are performed by an attorney, agent or broker.

In Santa Clare Mining Association vs. Meredith, *supra,* the Court says:

"If a president or director of a corporation renders services to his corporation which are not within the scope, and are not required of him by his duties as president or director, but are such as are properly to be performed by an agent, borker or attorney, he can recover for such services upon an implied promise."

The admission of the directors that Dunlap "had performed emergency duties other than those usually designated as the duties of Vice-President," such as those recited, certainly constitutes testimony tending to show the rendering of services outside of and beyond those required of him as an officer of the company.

That the verdict is excessive is one of the grounds of the Motion for New Trial, but inasmuch as it is not urged, and for that reason only, it is not considered.

The motion for new trial is denied. Defendant is granted twenty days within which to take any steps he may be advised.

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Opin-

ion. Filed July 17th, 1911. T. J. Edwards, Clerk.
[309]

[Certificate of Clerk U. S. Circuit Court to Record.]

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Nevada.

No. 1038.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Appellant,

vs.

R. P. DUNLAP,

Appellee.

District of Nevada,—ss.

I, T. J. Edwards, clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing three hundred and nine typewritten pages numbered from 1 to 309, both inclusive, are a true copy of the record, and of all the proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error, the original citation being also hereto attached.

I further certify that the cost of this record amounts to the sum of $190.60, and that the same has been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this 28th day of August, 1911.

T. J. EDWARDS,
Clerk. **[310]**

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 1117.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

Citation [Original].

United States of America,
Ninth Judicial District,—ss.
To R. P. Dunlap, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be holden in the city of San Francisco, California, in said Circuit, on the 28th day of August, 1911, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Ninth Circuit, District of Nevada, wherein The Montana-Tonopah Mining Company, a corporation, is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD S. FARRINGTON, District Judge of the United States, at Carson

City, within said Circuit, this 4th day of August in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the 136th.

E. S. FARRINGTON,
United States District Judge.

Good cause appearing therefor, the return-day hereof is hereby extended to and including August 30th, 1911.

E. S. FARRINGTON,
Judge.

August 26, 1911. **[311]**

Service of copy of the within is hereby admitted this 12th day of August, 1911.

McINTOSH & COOKE,
Attorneys for Defendant in Error. **[312]**

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Citation. Filed August 4, 1911. T. J. Edwards, Clerk. **[313]**

The United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 1117.

R. P. DUNLAP,
Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),
Defendant.

Writ of Error [Original].

United States of America,
Ninth Judicial District,—ss.

The President of the United States of America to the Honorable Judge of the Circuit Court of the United States, for the Ninth Circuit, District of Nevada, Greeting:

Because, in the records and proceedings and also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between R. P. Dunlap, plaintiff, and The Montana-Tonopah Mining Company, a corporation, defendant, a manifest error has happened to the great damage of the said The Montana-Tonopah Mining Company, a corporation, defendant, as by its complaint appears;

We being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, together with this writ, so that you may have the same at San Francisco, California, in said Circuit on the 28th day of August, 1911, next in the said [314] Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 7th day of August, A. D. 1911, and in the 136th year of the Independence of the United States of America.

T. J. EDWARDS,
Clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada.

Allowed by:

E. S. FARRINGTON,
United States District Judge.

The receipt of a copy of the within writ of error is hereby admitted this 12th day of August, A. D. 1911.

McINTOSH & COOKE,
Attorneys for Defendant in Error.

[Answer of Judges to Writ of Error.]

District of Nevada,—ss.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the **[315]** District of Nevada:

The record and proceedings of the plaint whereof mention is made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] T. J. EDWARDS,
Clerk. **[316]**

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada, R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Writ of Error. Filed August 14, 1911. T. J. Edwards, Clerk. **[317]**

[Affidavit of Service of Citation on Writ of Error.]

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

R. P. DUNLAP,

Plaintiff,

vs.

THE MONTANA-TONOPAH MINING COMPANY (a Corporation),

Defendant.

State of Nevada,
County of Nye,—ss.

M. McCrate, being first duly sworn upon her oath, deposes and says: That she is a resident of the State of Nevada, is above the age of twenty-one years, and is not a party to nor interested in the above-entitled action; that at 5:30 P. M., August 12th, 1911, she personally served C. H. McIntosh, one of the attorneys of record for R. P. Dunlap, with the Citation and Writ of Error in the case entitled "R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant," which said case is now pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, said case

being designated as No. 1117, by exhibiting the originals and each of them, which are hereto attached, and delivering a copy of each of the same to said C. H. McIntosh.

M. McCRATE.

Subscribed and sworn to before me this 23d day of August, A. D. 1911.

[Seal] S. R. MOORE,
Notary Public.

My commission expires Aug. 1st, 1912. **[318]**

[Endorsed]: No. 1117. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. R. P. Dunlap, Plaintiff, vs. The Montana-Tonopah Mining Company, a Corporation, Defendant. Affidavit of Service of Citation and Writ of Error. Filed August 25th, 1911. T. J. Edwards, Clerk. Rufus C. Thayer, Attorney for Defendant, 1209 Addison Head Building, San Francisco. **[319]**

[Endorsed]: No. 2030. United States Circuit Court of Appeals for the Ninth Circuit. The Montana-Tonopah Mining Company (a Corporation), Plaintiff in Error, vs. R. P. Dunlap, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Nevada.

Filed August 30, 1911.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 2030

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

THE MONTANA-TONOPAH MINING COMPANY (a corporation),
Plaintiff in Error,

vs.

R. P. DUNLAP,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Nevada.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

RUFUS C. THAYER,
Attorney for Plaintiff in Error.

Filed this.....day of September, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 2030

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE MONTANA-TONOPAH MINING COMPANY (a corporation),
Plaintiff in Error,

vs.

R. P. DUNLAP,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Nevada.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Statement of the Case.

The defendant in error, as plaintiff in the Court below, on the 26th day of February, 1910, brought this action against the plaintiff in error, as defendant, in the Fifth Judicial District of the State of Nevada in and for the County of Nye. The case was thereafter duly removed to the Circuit Court of

United States, Ninth Circuit, District of Nevada, on the grounds of diversity of citizenship, the defendant being a Utah corporation and the plaintiff a citizen and resident of the State of Nevada.

In this brief the parties will be referred to as to the respective positions occupied by them in the Court below.

The plaintiff brought suit against the defendant on a quantum meruit to recover for the value of services rendered by him to the defendant from January, 1903, to February 15, 1910, at the instance and request of the defendant, alleging that defendant agreed to pay therefor whenever it was out of debt and that defendant was out of debt on February 15, 1910, and that the reasonable value of the services so rendered was Twenty-four Thousand Nine Hundred ($24,900) Dollars, that Four Thousand Four Hundred ($4,400) Dollars had been paid, and this action was brought to recover the balance of Twenty Thousand Five Hundred ($20,500) Dollars (Tr. 1-2).

The defendant, by its answer, denies that the plaintiff rendered any services whatsoever to it, excepting such services as were incidental to the offices of Secretary and Treasurer of the defendant, which offices were held by the plaintiff from February 15, 1903, at a salary of One Hundred and Fifty ($150) Dollars per month up to and including October 15, 1903, and thereafter at a salary of Two Hundred ($200) Dollars per month up to and including Feb-

ruary 21, 1905, at which time the resignation of the plaintiff was accepted by the defendant company, all of which salary was paid to the plaintiff, and the defendant further alleges in its amended answer that the plaintiff was on or about September 8, 1903, elected a Director of the Company, and was on or about September 12, 1905, elected a Vice-President of the company, both of which offices he continued to occupy until the date of his resignation from the Board of Directors of the company on February 15, 1910, a few days prior to the bringing of this action, and that the plaintiff has performed no services for or on behalf of the defendant corporation, excepting those incidental to the offices of secretary and treasurer of the company, for which he has been fully paid and compensated, and excepting those incidental and properly belonging to the offices of Director and Vice-President of said company usually, duly and legally performed by such officers without compensation, and that there is nothing due or owing from said defendant to said plaintiff (Tr. 6-9).

On February 20, 1910, at the time of the trial the defendant filed a further amended answer, identical with its previous amended answer, excepting that in the last amended answer defendant set up the statute of limitations against any claim of the plaintiff for services rendered to the defendant prior to a date four (4) years before the beginning of this action (Tr. 10-13).

Upon the issues joined by these pleadings and substantially as set forth in this statement the case was tried before a jury, and the following facts were in brief disclosed:

Statement of Facts.

The defendant corporation was organized under the laws of Utah some time in 1902, at which time one Charles E. Knox became its President and continued in such office up to the date of the trial of the case on March 12, 1911 (Tr. 246). The corporation owned certain mining property and maintained its offices in Tonopah, Nevada, but adopted no by-laws until September, 1907 (Tr. 248).

Some time in the latter part of the year 1902, Mr. Knox met the plaintiff Dunlap in Kansas City and the latter wanting to know if there was an opening in the West, Mr. Knox suggested that there was and that Dunlap return to Tonopah with him. Dunlap looked the situation over after arriving in Tonopah and expressed a desire to become connected with the Montana-Tonopah Company, and in January, 1903, became its Secretary and Treasurer and the books of the Company were turned over to him by Mr. Morris, who had been acting as the Secretary previously. His salary was at this time fixed at $150 a month (Tr. 19). At this time there were no by-laws of the company designating the character of services to be rendered by such Secretary-Treas-

urer and no special agreement was made as to the work to be done by Mr. Dunlap, who proceeded to perform the duties incident to those offices and continued to do so for the designated salary up to October 3, 1903, when his salary was raised to $200 (Tr. 26). He continued to fill such consolidated office until February 15, 1905, when his resignation from such office was accepted. Just prior to his resignation he made an application to the Board of Directors for an increase in his salary to $300 per month, and such increase being denied, tendered his resignation (Tr. 27-252). At this time a resolution was passed by the Board of Directors expressing appreciation and gratitude for the manner in which he had performed his "duties" and expressing approval that he was still to remain a director so that they might benefit by his "wise counsel" (Tr. 28-30). Dunlap at this time made no claim for special services theretofore rendered and for which he was asking compensation at the time of the trial. These special services were testified to in a vague and desultory manner, as consisting of attention to all outside business matters pertaining to the management of the company, but narrowed down, those alleged special services rendered from January, 1903, to February 15, 1905, when he resigned his office as Secretary-Treasurer, resolved themselves into three different items, viz.:

(1) Some attention given to checking up the patent surveys in the Surveyor General's office at

Reno on application for patent some mining ground belonging to the company, the services claimed to have been rendered at the instance of Mr. Knox, the President (Tr. 22).

(2) Settlement of a claim for damages for the death of one Mitchell, an employee of the company (Tr. 22).

After his resignation from these offices Dunlap continued to act as a Director of the company only until September, 1905, when he was also elected Vice-President (Tr. 30). His claims for special services rendered during this period and that of his vice-presidency, up to the 15th day of February, 1910, are based upon alleged counsel and advice which he gave to the Superintendent "upon the general policy and welfare of the company" (Tr. 34), and upon some alleged specific services rendered in settling some claims for injuries (1) to one Alex Ursin and one Jock or Smeige and also in the case of Samuel Merton, all of whom were employees of the company and injured in its service. This was during the year 1907 and the record shows from both the testimony of Mr. Dunlap and Mr. Knox that Mr. Knox made the settlement in the instance of the first two (Tr. 36, 258-260).

(2) Services rendered in 1907 in connection with securing a reduction in certain taxes levied upon the mill properties of the company (Tr. 38).

(3) Services rendered in 1908 in connection with injuries rendered one Thomas H. Swope at the mill

of the company, settlement for which was made by Mr. Knox in the East (Tr. 42, 256-7).

Other services alleged to have been rendered the corporation during 1909 and up to February, 1910, were of such a vague, indefinite and desultory nature that they could not by any possibility be regarded as specific services rendered in an unofficial capacity. He says himself that it would be generally advising the "Secretary about stock issues, " about general business transactions, and about the " payment of notes owed at that time, signing of " notes which were authorized by resolution for " money borrowed" (Tr. 49).

In fact, there is nothing in the record to show that the plaintiff was ever specially employed or requested or directed by the corporation or its officers to do or perform any of the services for which he is claiming compensation. During the entire period covered by the alleged services, he was either the Secretary-Treasurer, a Director or a Director and Vice-President of the corporation, and the uncontradicted testimony of Mr. Knox is that these services were those usually and customarily rendered by such officers in similar corporations at the time they were so rendered in said District.

In February, 1910, the plaintiff, at a meeting of the Board of Directors, made a demand for compensation for these past services covering a period of seven years, and upon the Board refusing to recog-

nize the demand, tendered his resignation, which was accepted (Tr. 51).

At this meeting the plaintiff, at the resquest of the Board, presented a "brief" of his services (Defendants' Exhibit "B") (Tr. 241), which is a curio in documents of this character. In this "brief" plaintiff stated that the original assessment for the mill of the defendant was $100,000 (Tr. 242). It appears from the uncontradicted testimony of Mr. Lynch, one of the Directors of the company, that the original assessment as shown in the County Treasurer's books was $58,333 (Tr. 238-9-40). This was admittedly reduced to $25,000 by the County Board of Equalization upon a showing that the mill had only been in operation three months instead of a year. Mr. Dunlap, however, in his brief, took credit for a reduction of $75,000 on this assessment. The Board of Directors, relying upon this statement, and as a matter of compromise, by resolution agreed to offer Mr. Dunlap a check for $1,000. While it is true that the Court ruled out all matters in said resolution adopted by the Board in the nature of a compromise, it still permitted the skeletonized resolution to go to the jury as an admission on the part of the corporation defendant that the plaintiff was entitled to some compensation for these past services which were rendered within the scope of his duties as an officer of the company.

There was nothing in the record to show, either in the testimony offered by the plaintiff or the defend-

ant, that his services in these matters were other than gratuitous or that they were looked upon by the corporation or himself as being other than those which any director or officer of a corporation, interested therein both as such director and as a stockholder, would be willing to render in conjunction with the other officers of the Board. The only testimony of any kind looking to promise of compensation for his services was his assertion that Mr. Knox told him in numerous conversations (only one specific instance of which he could fix the date of (January or February, 1908) that "he (Knox) pro- " posed to see that his services were properly com- " pensated for"; the compensation to be provided when the company got out of debt (Tr. 72-73).

It appears from the testimony of plaintiff that the company had $175,000 in its treasury and declared a dividend of $100,000 early in 1905 and he made no claim for compensation at that time (Tr. 119-20) nor until five years later. All this time he continued to act as a Director and a part of the time as the Vice-President of the company and made no sign of discontent. During the time that plaintiff was connected with the corporation he had a private business office in town and transacted an independent business (Tr. 122). Also took employment from other companies, notably the Mizpah Extension Company, and acted as the Secretary of the Goldfield Portland Company while he was the Secretary and Treasurer of the defendant (Tr. 313) receiving

a salary of $150 or $200 and all transfer fees upon stock certificates, averaging some $45 a month.

There is nothing in the record to show that Knox as President was ever authorized to state to Dunlap that he would receive aught but the stipulated salary he did receive, as Secretary and Treasurer, or that he would be entitled to any compensation for the interest he took in the affairs of the corporation while a Director or Vice-President therein.

The President of the corporation had received no salary up to September, 1909, when as General Manager of the corporation he was voted a salary beginning at that time (Tr. 291), and the Vice-President while performing the duties of the President could be entitled to none; and it appeared that these services performed by Dunlap were of the same character of services rendered by Knox as President, who settled various claims against the corporation during the period covered by the claim of Dunlap; and in every instance save that of Merton, assisted in settling, if he did not entirely settle, all the claims for injuries in which Dunlap claimed that he rendered independent services.

There was practically no conflict in the testimony. The main contention being as to the right of the plaintiff to recover under the circumstances shown by the record.

The defendant made a motion for a nonsuit at the close of plaintiff's case, which was denied (Tr. 147).

At the close of the trial the defendant asked the Court for a directed verdict for the defendant, which was denied. The case went to the jury, which returned a verdict for the plaintiff for the sum of $7,500. Upon the judgment based on such verdict, the defendant prosecutes this writ of error and as grounds for the reversal of said judgment, assigns the following errors:

Specification of Errors.

I.

The Court erred in the admission of evidence of the plaintiff over the defendant's objection as to what services plaintiff rendered to the defendant company prior to February 15, 1906, at which time the statute of limitations began to run for the purposes of this action (Tr. p. 22).

II.

The Court erred in the admission of evidence of the plaintiff over the defendant's objection that Charles E. Knox told plaintiff that he, the said Knox, proposed to see that plaintiff's services would be properly compensated for at some future time, for the reason that it does not appear that the said Knox was properly authorized to make any such agreement with plaintiff, and that the evidence so elicited is as to an agreement with Charles E. Knox

and not with the defendant corporation (Tr. 58, pp. 71 and 72).

III.

The Court erred in the admission of the plaintiff's evidence over defendant's objection as to the value of services in the Tonopah Mining District, State of Nevada, without limiting that the value of such services were identical to those concerning which plaintiff testified (Tr. pp. 71 and 72).

IV.

The Court erred in sustaining plaintiff's objection to the question propounded to the plaintiff on cross-examination that the defendant suggested to plaintiff that he should not move his office with those of the company at the time the company's offices were removed from the Town of Tonopah up to the mine (Tr. 82).

V.

The Court erred in sustaining plaintiff's objection to the admission of a portion of the minutes of a meeting of the Board of Directors of the defendant relating to authorizing the settlement of the case of Swope against the company to recover for personal injuries (Tr. pp. 86 to 87).

VI.

The Court erred in overruling defendant's motion at the close of plaintiff's case in chief and before the

charge to the jury was given to direct the jury to find for the defendant upon the following grounds:

(1) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That the plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant, excepting of those of Secretary and Treasurer of defendant corporation, which last services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been render-

ing services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

VII.

The Court erred in overruling defendant's motion at the close of plaintiff's case in chief for a judgment of nonsuit for the following reasons (Tr. pp. 147 and 148).

(1) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, in either in his official or unofficial capacity as an officer or director of the company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That the plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant, excepting those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by the plaintiff to the corporation

were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

VIII.

The Court erred in sustaining an objection to the testimony of witness W. B. Alexander as to what was the assessed valuation of defendant's property in Nye County, Nevada, for the year 1907 (Tr. p. 186).

IX.

The Court erred in sustaining an objection to the testimony of Charles E. Knox as to whether or not he had received any salary as the President of defendant corporation, and as to whether or not he had ever received any salary as President of defendant corporation during the time which plaintiff claims to have rendered services to the said corporation as Vice-President thereof (Tr. pp. 248-249).

X.

The Court erred in admitting as evidence over defendant's objection that portion of the resolution set forth in the minutes of a meeting of the Board of Directors of defendant company shown on page 106

of defendant's minute book, beginning at line six therein and ending at line twenty-five therein, reading as follows:

> "Whereas at times during the past five years it has been necessary to call upon Vice-President Dunlap to perform in cases of emergency duties other than those usually designated as the duties of Vice-President, such as the exercise of his good offices in behalf of the company in case of accident to employes of this company, more particularly in the case of John Mitchell, S. Merton and others; his efforts in behalf of the company in securing a reduction of taxes on the properties of this company, more particularly the taxes for the year 1907, when the tax against the mill was $3,450, which through Mr. Dunlap's efforts was reduced $862.50, thereby effecting a saving of $2,587.50, and at the same time a reduction of $5,875 in the assessed valuation of the surface improvements, resulting in a saving of $202.88, and the separate listing of the railroad spur, effecting a saving of $78.09" (Tr. pp. 292-293).

XI.

The Court erred in admitting in evidence over defendant's objection that portion of a resolution set forth in the minutes of a meeting of the Board of Directors of defendant company adopted February 15, 1910, reading as follows:

> "It is the sense of this Board that Mr. Dunlap is entitled to some compensation for the services rendered in these matters" (Tr. p. 293).

XII.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "3. The jury are instructed that the plaintiff cannot recover from the defendant for the value of any services rendered for the benefit of the defendant while he was a director of the defendant corporation, if such services were for the general benefit of the corporation."

XIII.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "4. The jury are instructed that before the plaintiff can recover in this case, it must appear either by its Articles of Incorporation, or by some by-law or resolution of the Board of Directors made or passed prior to the performance of such service, that provision was made for the payment of compensation to the plaintiff."

XIV.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "13. The jury are instructed that the plaintiff cannot recover compensation for services rendered in the past if it was never voted him, and if he had on several occasions acted as nothing were due him from the defendant corporation."

XV.

The Court erred in refusing to give the following special instruction requested by the defendant:

> "14. The jury are instructed that if they believe from the evidence the plaintiff did render

services beyond those usually rendered by a vice-president, director, secretary, or treasurer of the defendant corporation, and there was no promise on the part of the defendant to pay therefor; and if you believe from the evidence that there was no understanding or idea upon the part of the directors of the defendant corporation as a body, that the plaintiff was to receive compensation for such services, the plaintiff cannot recover."

XVI.

The Court erred in refusing to give the following special instruction requested by the defendant:

"17. The jury are instructed that if they find from the evidence that the defendant company had no by-laws during the period while plaintiff was secretary and treasurer of such corporation, and if they find from the evidence that there was no agreement between the defendant corporation and the plaintiff as to what services the plaintiff should perform as secretary and treasurer of said corporation, the plaintiff is presumed to perform while in the occupancy of that office such services as are ordinarily performed by such officer of other corporations, under similar circumstances, in the community where such services are rendered."

XVII.

The Court erred in refusing to give the following special instruction requested by the defendant:

"18. The jury are instructed that the plaintiff cannot recover compensation for any services claimed to have been rendered prior to February 15th, 1907."

XVIII.

The Court erred in charging the jury as follows:

"Now some testimony has been offered here tending to show what the custom and usage was governing the duties that pertain to the office of secretary and treasurer. You will understand that testimony with this instruction: in the absence of any rule of the company, of any law, or of any stipulation in any contract, regulating, describing and specifying what such services are, you may look to this custom; but in order to bind the plaintiff, Mr. Dunlap, by such custom, it must be shown that he understood, when he entered into the contract, what his duties were as defined by this custom, whatever it may be."

XIX.

The Court erred in charging the jury as follows:

"That whatever services are rendered by a director or a vice-president, within the line of his official duty, or which are necessary in the performance of his official duty, or which are incidental to the performance of his official duty, must be regarded as rendered gratuitously, and he cannot recover for them without an express contract entered into before the services were rendered; but for such services as are not required of an officer, either by law or by any by-law of the corporation, or by any rule of the corporation, and which can be performed by an agent or by a servant or by an attorney, who need not be a director and who is not a director, these may be considered as non-official duties, and as duties beyond the scope of the employment of an officer."

XX.

That the damages awarded by the verdict of the jury are excessive.

XXI.

That the verdict of the jury is contrary to law for the following reasons:

(1) That the damages awarded by the jury are excessive.

(2) The testimony fails entirely to show that the defendant made an express or implied contract with the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the company.

(3) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(4) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(5) That the plaintiff was never requested by the defendant to perform any services whatsoever on be-

half of the defendant, excepting of those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(6) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(7) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

XXII.

That the verdict of the jury is not sustained by the evidence for the following reasons:

(1) The testimony fails entirely to show that the defendant made an express or implied contract with

the plaintiff for rendering any services to the defendant or to pay the plaintiff compensation for any services rendered, either in his official or unofficial capacity as an officer or director of the company.

(2) The testimony fails entirely to show that the corporation or its officers or directors knew or believed that plaintiff was rendering any services to the defendant for which plaintiff intended to claim compensation or for which defendant intended to compensate plaintiff.

(3) That plaintiff was not employed by defendant to render any service other than those usually rendered by officers of corporations performing their duties under similar circumstances at the same time and place at which the plaintiff claims to have rendered services to the defendant.

(4) That plaintiff was never requested by the defendant to perform any services whatsoever on behalf of the defendant excepting of those of Secretary and Treasurer of defendant corporation, which last mentioned services were rendered upon an express contract and for which defendant had previously paid the plaintiff.

(5) For the reason that the evidence shows that at all times the plaintiff claims to have been rendering services to the corporation the plaintiff was the Secretary and Treasurer of the corporation under an agreed salary which was paid to him, and was an officer and director of the corporation and was not

entitled to recover compensation for any services rendered while he occupied such position of officer or director of the corporation.

(6) That the evidence fails to show that any services rendered by plaintiff to the corporation were continuous, but that if any services were rendered by plaintiff for the benefit of the corporation at all they were segregated and were such services as were usually rendered by officers or directors of corporations carrying on and conducting their business at the same time and place as the defendant corporation and under circumstances similar to those carried on by the defendant in this action.

XXIII.

That the Court erred in charging the jury as in this assignment of error set forth, and that said charges were erroneous, confusing, misleading and inconsistent, for the reason

That the Court erred in charging the jury in one instance as follows:

> "In segregating unofficial from official services you will consider all the testimony in the case",

and also at a later time as follows:

> "There has been read in your hearing from the minutes of the Board of Directors of the corporation for February 15th, 1910, a recital to the effect that it is the sense of the corporation that the plaintiff should be allowed some compensation for services therein mentioned. The

fact that this admission was made after the performance of the acts mentioned rather than before does not detract from its efficiency as an admission of the fact that the directors then present stated that the services mentioned in the resolution were without the scope of the official duty of Mr. Dunlap; nor does it detract from this as an admission that at the time the resolution was passed these directors regarded the services not as gratuitous."

Argument.

The contention of the defendant is:

I. That the plaintiff had no cause of action against the defendant for services rendered in that the same were not shown to be without the scope of his duties as a Director, Secretary and Treasurer or Vice-President of the Board of Directors.

II. That assuming *pro argumenti* that such services were unofficial, they were of a purely voluntary character rendered at odd times and of which the Board of Directors had no understanding they were to be paid for, and had no power to bind the corporation by agreement to compensate therefor long after their rendition.

III. That the major portion of said claim for services, if any existed, i. e., for those alleged to have been rendered between January, 1903, and February, 1906, was barred by the Statute of Limitations of the State of Nevada.

In considering the questions involved herein, we, while urging all errors assigned, shall consolidate Errors 2, Subdivisions 1, 2, 3, 4, and 5 of Error 6, Errors 12, 13, 14, 15, 19, Subdivisions 1 and 2 of Error 21, and Subdivision No. 1 of Error No. 22 for purposes of argument, discussing them as a whole. These errors are so inter-related that the proposition of law involved in each is practically the same and may be discussed with reference to all.

I.

As a basis for the assignment of these errors we urge as a fundamental proposition of law that,

> **A director or officer of a corporation cannot recover compensation for services rendered such corporation excepting upon an express contract made with the corporation prior to the rendering of such services; or upon an implied contract to pay for services performed under such circumstances as to show that it was well understood by the officer and director rendering the services and by the corporation, that such services were not to be gratuitous.**

Neither of these conditions was shown to exist in this case. Indeed there was no attempt to show on the part of the plaintiff that he had an express contract. And the implied contract relied upon by him was based upon the fact that he had rendered certain services which he claimed were without his official duty, and that Mr. Knox had at various times stated to him that he would see that he was com-

pensated therefor, which statement, if made, could be no more than a mere personal guaranty on the part of Mr. Knox for there is not a scintilla of evidence that the latter had any authority, express or implied, to bind the corporation by any such statement.

Plaintiff claimed to have rendered many of these services prior to February, 1905, during all of which time he was the Secretary-Treasurer of the Board. In February of that year he demanded an increase in his salary from $200 to $300 and it being refused resigned from those offices.

One of the particular bits of evidence on which plaintiff relied was a resolution passed at this time by the Board (and doubtless drawn by himself as Secretary) commending him for his past services (Tr. 28).

This resolution plainly indicates that, at that time, the corporation had no knowledge whatever of the fact that Mr. Dunlap was expecting compensation for these alleged services, which included the much vaunted services regarding the patents of the company, and his attention to the Mitchell claims. On the contrary it undoubtedly considered them as among the services which had "earned for him the "'*warmest appreciation*' of the Board and Stock-" holders", and the "*gratitude*" of all persons interested in "the development of the District".

This was then the opportunity for the plaintiff to have demanded compensation for these services

and to have placed on record in the minutes a claim for compensation therefor. But he makes no such claim, and the Board recognizes no claim excepting the moral one of appreciation of what he has done and goes on to assert the feeling of gratitude of the Board that the corporation is to continue to reap the benefits of his "wise counsel" by virtue of the fact that he is still to continue as a director.

It is plainly evident that at this time the services rendered by the plaintiff were considered by the corporation, through its Board of Directors, as purely those of a volunteer, interested in the corporation it is true, as an officer, even though they might not possibly be deemed strictly in line of his duty as such officer.

A director is as one of the trustees of the corporation, interested with the direction and management of its business and in a more or less new community like Tonopah and with a corporation struggling to obtain a business standing, it is not unusual for the officers to take a keen personal interest in the promotion of its interests even to the extent of voluntarily performing services that might be deemed more or less unusual in their natures, such services naturally redounding to their own interest, as a member or stockholder of the corporation.

But the services rendered were not unusual in their nature. It appears from the uncontradicted testimony of Knox (Tr. 303) that it was customary at that time and place for the Secretary-Treasurer

to render just such services as were rendered by Dunlap during his incumbency of this office.

As was said by the Supreme Court of Wisconsin, in the recent case of Swedish-American Bank v. Koebernick, 117 N. W. 1021, 1022, in referring to the duties of presidents and secretaries of corporations,

> "Both are general officers of such corporations who often perform interchangeably a wide range of duties. Indeed it is a matter of common knowledge that the presidents and secretaries of ordinary private corporations perform much the same functions in the conduct of corporate business enterprises that are performed by general partners in a copartnership business."

We maintain, however, that even were we to admit that such services were to come under the rule of services outside of his official capacity, there must still have been, if not an express contract, a promise implied from all the circumstances to pay therefor. The resolution introduced by the plaintiff himself precludes any idea on the part of the corporation that it considered the services as other than gratuitous, and places plaintiff entirely without the rule that where there is employment without understanding as to definite payment, there is still an implied promise to pay something in the future.

> "From the service of a director the implication is that he serves gratuitously. The latter presumption prevails in the absence of an understanding or an agreement to the contrary when directors are discharging the duties of

other offices of the corporation to which they are chosen by the directory such as those of president, secretary and treasurer * * *

"The fact is, however, that in the active and actual business transactions of the world, many officers of corporations, who are also members of their Boards of Directors, spend their time and energies for years in the interest of their corporation, and greatly benefit the owners of their stock, under agreements that they shall have just, but indefinite, compensation for their services. We are unwilling to hold that such officers should be deprived of all compensation because the amounts of their salaries were not definitely fixed before they entered upon the discharge of their duties. A thoughtful and deliberate consideration of this entire question, and an extended consideration of the authorities upon it, has led to the conclusion that this is the true rule: *Officers of a corporation who are also directors, and who, without any agreement, express or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services can recover no back pay or compensation therefor; and it is beyond the powers of the Board of Directors, after such services are rendered, to pay for them out of the funds of the corporation or to create a debt of the corporation on account of them.*"

National Loan & Investment Co. v. Rockland Co., 94 Fed. 339.

This case, we think, expresses the rule clearly as applicable to this case.

An examination of the testimony of Mr. Dunlap in relation to the specific instances of services ren-

dered will show that there never was any definite employment.

Take for instance the matter of the services rendered before the Board of Equalization in order to have the taxes reduced on the mill of the company for the year 1907. We quote this testimony on cross-examination as follows:

"Q. And don't you know that you voluntarily made that remark, 'I am going up there anyway on that day, and I will attend to it myself'?

A. No, sir, I do not.

Q. You don't know?

A. No.

Q. But you may have made that remark, may you not?

A. There is no reason why I should have gone there except for this matter.

Q. Did anyone tell you to go?

A. I do not recall that they did.

Q. *You did it voluntarily, did you?*

A. *I did it in the interest of the company.*

Q. *You did it in the interest of the company?*

A. *Yes, sir.*

Q. *Did anyone connected with the company suggest that you be paid for performing that service?*

A. *At that particular time, that particular service?*

Q. *Yes.*

A. No, sir.

Q. *At any of these times when the Board of Directors was in session was there any suggestion made with reference to compensation to you for this service which you were claiming to have been rendering?*

A. *No, sir.*" (Tr. 101.)

It will be seen from the foregoing that the alleged services in connection with the Board of Equalization were purely voluntary upon the part of plaintiff and performed as he says in the interest of the company, which as a Director of the corporation, being also a stockholder, he would be supposed to have at heart.

Upon this point, the testimony of Mr. Knox is corroborative of the fact that these services were purely voluntary. In referring to the proceedings of the Board of Directors at a meeting held in the fall of 1907, in discussing this over-taxation of the company's mill, he says:

> "And the instruction was to the Secretary to write a letter to the Board of Commissioners about the overcharge, and ask for a reduction; Mr. Dunlap was present, and said, 'I am going before the commissioners on next Tuesday, and I will take it up', and I said, 'All right'." (Tr. 263.)

And again, at page 287:

> "Q. Your recollection is, at any rate, that after some discussion of the matter, that Mr. Dunlap volunteered that he would go before the Board and endeavor to secure a reduction?
>
> A. The following Tuesday, yes, sir.
>
> Q. Was that acquiesced in?
>
> A. Yes, sir, that was acquiesced in.
>
> Q. Was he not by yourself requested to do so?
>
> A. No, if it was it was the first time I ever had a chance to ask him; he usually volunteered to do things.
>
> Q. Do you have a clear recollection whether you requested him to do so or not?

A. No, I have a recollection of the statement, 'I am going before the Board next Tuesday anyhow, and I will take it up', and I think it was merely acquiescence of the Board, but not a request.

Q. Your recollection of the statement is that it conveyed the idea that he had other business before the Board?

A. Yes, sir and to be specific, I thought it was Round Mountain business that he was going on."

This testimony of Mr. Knox is absolutely uncontradicted. It will therefore be seen that the specific service rendered in reference to going before the Board of County Commissioners was not requested by anyone connected with defendant corporation, but that plaintiff went as a volunteer and upon the understanding by defendant corporation that said services were to be gratuitous, plaintiff then being a member of the Board of Directors of the corporation.

Again we beg to call the attention of the Court to the following testimony of plaintiff:

"Q. You never made any claim for special services rendered in securing the patents, in connection with that?

A. *I did not.*

Q. When did you first speak of that to the Board of Directors; when did you first ask for compensation from the Board of Directors for rendering those services?

A. The 15th day of February, 1910."

From the foregoing it will be seen that a portion of the services for which plaintiff is suing, were

rendered almost seven years prior to the time when he made any claim for compensation.

"Q. Do you know whether or not the corporation expected to pay you for those services?

A. *I felt* that they did.

Q. Do you know whether they expected to, Mr. Dunlap?

A. It is pretty hard to know what a corporation expects to do.

Q. Can you remember whether or not on the date of your resignation in 1905, you expected to receive further compensation for past services?

A. I certainly did.

Q. What induced you to expect that?

A. *Conversations with the President and General Manager of the company in regard to matters of that kind.*

Q. And *nothing else?*

A. *Nothing else.*" (Tr. 116.) * * *

"Q. *You had had a previous promise from the company that they would pay you when the company was out of debt?*

A. *No, sir, not from the company;* I had had talks with Mr. Knox along that line, to the effect when we got into a condition,——

Q. Am I to understand you, and the Court and jury to understand you, that you had a promise from the company or from Mr. Knox that you would be paid some compensation when the company was out of debt, the promise being made prior to this date of February, 1905?

A. The first conversation when that took place was prior to that date.

Q. And the company was out of debt then?

A. It was not stated, Mr. Thayer, I beg your pardon, when the company was out of debt, specifically, that was to be paid, but that he and

I were to be partly compensated for what we were doing when the company got into condition to do it; after they had equipped their plant and were making money.

Q. Well, the company was in position to do it then, was it not?

A. Not with the contemplated building of the mill.

Q. *But they divided one hundred thousand dollars in dividends?*

A. *They did.*" (Tr. 120.)

And again that Knox stated to him that,

"Let this matter come out as it may, when we get out of debt and on Easy Street, *I propose to see that your* services are properly compensated for." (Tr. 72-73.)

From the foregoing it will be seen that plaintiff bases his claim not upon any understanding with the company or its Directors as a Board but upon some vague talks with the President of the defendant corporation, who was alleged to have stated that he and plaintiff were to receive compensation, and upon a broad assertion that Knox *proposed to see* that his services were compensated for when the company got out of debt.

Can this statement by any means be tortured into an employment by Knox of Dunlap to perform the services alleged to have been rendered, for it is only upon an employment by Knox that Dunlap could hope to recover and upon which he relies? Or is it not merely a personal guaranty on the part of Knox, that in view of the services voluntarily rendered, he,

Knox, would use his endeavors to see that the corporation gave him some compensation?

Can such alleged assertions, guarantees or promises be held binding upon the corporation years after the services were voluntarily rendered, gratuitously from the point of view of the corporation, as is evidenced by the resolution of the Board adopted in 1905, and would the stockholders be held bound by any recognition of such promises, guarantees or assertions of Knox which the record shows were utterly without foundation in authority?

We think this Court will not hold that any such circumstances or facts bring the plaintiff within the rules governing in cases of this kind, and there is no contradiction of such facts.

In the case of Wood's Sons Co. v. Schaefer, 173 Mass. 443 (73 Am. St. Rep. 305), which was an action against a corporation for services rendered, the point was made that one of the Board of Directors made a promise to the plaintiff that he should be President of the corporation with a certain salary. The Court says:

> "It does not appear that Wood's alleged promise ever was communicated to the other directors, and there was nothing in the circumstances that would leave it more than a conjecture that the reasonable interpretation of the defendant's coming there would have been that *he expected to be paid.*"

What more does plaintiff testify to? He frankly admits that he never had any employment from the

corporation; that he performed these services expecting to be paid and that he *felt* the corporation expected to pay him. "That it was pretty hard to "know what a corporation expects to do." That is pretty slim authority on which to bind the stockholders of this corporation to pay him $7,500 for services which the record shows were either rendered by him in his official capacity or as a pure volunteer. And he does not make the slightest attempt to connect the corporation with these alleged promises of Knox which are flatly denied by the latter.

See Tr. 264, where the following appears:

> "Q. Did you know that he expected compensation for the services which he was rendering at the time?
>
> A. No, I did not.
>
> Q. When did you first learn that he expected compensation for such services?
>
> A. February 14th, 1910.
>
> Q. So far as you know, as the executive head of this corporation, was Mr. Dunlap ever requested to do anything for the corporation from the time that he resigned as Secretary and Treasurer, outside of the duties of a Vice-President and Director?
>
> A. No, unless Mr. Dunlap's statement that he would go before the commissioners, for instance, unless an acquiescence to that would be an instruction; I would not so consider it." (Tr. 265.)

Furthermore, an examination of the record discloses not an iota of testimony to the point that any requests were ever made by the defendant corpora-

tion for the performance of any of the alleged sporadic services, rendered at intervals throughout seven years and for which no compensation was asked until February 14, 1910.

It will be noted that plaintiff stated that these services were to be compensated for when the corporation was out of debt or in funds. Is not the declaration of a dividend of $100,000 an indication of being in funds? Plaintiff testifies that the company had $175,000 in its treasury in 1905 and then declared a dividend of $100,000 but he made no sign. What other legitimate conclusion can be deduced from such behavior than that he had been rendering these services voluntarily and gratuitously and the presentation of a claim was purely a secondary thought? Otherwise why did he not press his claim at the time the dividend was declared, if he really thought he was entitled to compensation for the services rendered?

Why did he not at the time he made an application for a raise in his salary to $300 present his claim for these alleged services? Why did he continue to perform services thereafter as he alleges up to February, 1910, with no definite employment and no definite compensation provided for, when the corporation did not see fit to recognize his entire services as of the value of $300 per month? Is it not a curious thing that in view of the attitude of the corporation, the low pecuniary estimate placed upon his services judging from the refusal of the Board

to increase his pay (although expressing "appreciation" for his past services and hopefulness that he would continue as a Director to give them the benefit of his "wise counsel"), that he should have continued to give this "wise counsel" to the Board without any agreement for compensation therefor? This in view of the further fact that it is this very "counsel" that he places reliance upon as one of the elements going to make up his past services at that time and the services thereafter alleged to have been rendered?

It will be noted in this connection that during the period plaintiff claims to have rendered these services for which he asks compensation, he emphatically states that he had nothing to do with the actual operation or development of the property of the company, and that there was a superintendent and general manager employed to attend to that end of the company's business, his services being in the nature of consultation and advice with these officers.

Upon this point of continuing to serve under the circumstances stated, we think the case of Kirkpatrick v. Penrose Ferry Bridge Co., 88 Am. Dec. 497, is pertinent where the Court says:

> "Corporate officers have *ample opportunity to adjust and fix their compensation before they render their services, and no great mischief is likely to result from compelling them to do so.* But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, *were not rendered on the foot of an express contract,*

there would be no limitation to corporate liabilities, and stockholders would be devoured by officers.''

See also

Loan Association v. Stonemetz, 29 Pa. St. 532.

In the case of Doe v. Northwestern Coal & Transp. Co., 78 Fed. 62, Judge Gilbert of this Circuit cites approvingly the two cases last cited and quotes from the latter as follows:

> ''It is well settled that a director of a corporation *is not entitled to compensation for services performed by him as such without the aid of a pre-existing provision expressly giving right to it.* They are the trustees for the stockholders, and as such, have the management of the corporate affairs. And to permit them to assert claims for services performed, and then support them by resolution, would enable the directors to unduly appropriate fruits of corporate enterprise. It would clearly be contrary to sound policy.''

In the case of Brown v. Republican Mt. Silver Mines, 30 Pac. 66 (Col.), the Court said:

> ''The ground for defendant's motion for nonsuit was that there could be no recovery in the case, since there was no evidence of an express agreement or arrangement between the plaintiff, Brown, and the defendant company by which he was to have compensation for the service sued for. The doctrine is generally accepted that directors of a corporation are not entitled to compensation for their services as directors unless such compensation is provided for or expressly sanctioned by the charter. Without such authority, the directors cannot lawfully

vote compensation to themselves for the performance of their ordinary duties, nor can they accomplish such end indirectly; as by designating one of their number 'Managing Director', and giving him a salary for the performance of such ordinary duties as are devolved by the charter upon the Board of Directors.

* * * * * * * *

"Some modern decisions announce a more liberal rule, to the effect that for services rendered by a director, not embraced in his ordinary duties as such, his employment by the corporation, and its promise to pay therefor, may be implied or inferred from the facts and circumstances of the case, thus allowing a recovery as upon a quantum meruit. *There are many reasons for adhering to the more stringent rule. Ordinarily the directors of a corporation are intrusted with extensive powers in the management of its affairs. They occupy positions of trust and confidence with reference to the corporate body and its stockholders. The relation is of a fiduciary character.*"

Plaintiff's relations as a Director of defendant corporation, to the stockholders of said corporation was of a fiduciary nature. He must exercise the highest good faith in his dealings with them. The Court says further:

"But, even if the more liberal rule may be resorted to in some cases, it certainly should be held that a director cannot recover compensation for services rendered by himself to his corporation upon an implied contract, *unless it be established by a clear preponderance of the evidence—First, that the services were clearly outside his ordinary duties as a director; and, second, that they were performed under circum-*

stances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation."

See also

Redbud Realty Co. v. South, 131 S. W. 340 (Ark.),

where the Court said:

"The president of the corporation is not entitled to any compensation for performing the ordinary duties of his office, unless a contract to that effect is made with him by its governing body. The contract may, however, be implied on the part of the corporation to pay its president for special services rendered outside of the ordinary duties of the office. The question of whether or not there was an implied contract to this effect is one of fact rather than of law. In considering whether or not such a contract has been approved, the nature of the corporation and its business, the nature and extent of the services rendered, the comparative amount and value of the services of other officers of the corporation, and all other circumstances of the case must necessarily be looked at and weighed, *and it must also be considered whether or not the services were performed under circumstances showing that it was understood by the proper officials of the corporation, and by the officer rendering the services that they were to be paid for.*"

The two elements necessary for plaintiff to have shown in this case were therefore that the services were actually without the line of his duties, and *an actual understanding* by the proper corporate officers as well as himself that his services were to be

paid for. Such understanding on the part of the corporation there was a signal failure to prove. The evidence clearly shows this beyond a doubt. It is apparent that nowhere was the corporation as a *body* ever notified of the fact that plaintiff claimed compensation for these alleged services until years after they were rendered, that is, in February, 1910. He does not even attempt to fix any such knowledge on the corporation. He says in substance, Knox knew I expected compensation. I *felt* that the corporation knew it. But it nowhere appears in the record that if Knox knew Dunlap expected compensation that he ever communicated such knowledge to any one of the Directors, much less to the corporation as a body.

In this regard we desire to call the attention of the Court to the case of

> Gill v. N. Y. Cab Co., 1 N. Y. Supp. 202 (48 Hun. 524).

The Court says:

> "An examination of this evidence, however, fails to show that there was any understanding or idea, upon the part of the directors of this corporation, *certainly as a body,* that the plaintiff was to receive any compensation for his services except his salary as Vice-President. *The evidence upon the part of the plaintiff himself tends to confirm this view, in that the only claim that he ever made to the corporation during the time that these services were rendered was that his salary as Vice-President should be raised.* If his present claim is correct, then, even if his salary as Vice-President had been

raised, *and he had performed services outside of the duties belonging to the office of Vice-President, his right of action to recover therefor would have been precisely the same as it is now, his salary not having been raised. The necessary conclusion to be drawn from this circumstance is that he considered that the compensation for those services which he was rendering to the company was to be paid for by the salary which he drew as Vice-President.*"

This case is in point in that plaintiff herein requested Knox as a Director of the defendant corporation to support his demand for an increase of salary at a meeting of the Board of Directors, from $200 to $300 per month. If plaintiff had expected or thought he was entitled to extra compensation, or compensation for his alleged services other than his salary, we contend that he would not have asked for an increase in his salary as Treasurer and Secretary, or upon its refusal would have made a demand for this special compensation.

The case of O'Brien v. John O'Brien Boiler Works, 133 S. W. 347 (Mo.), decided January 11, 1911, was an action to recover compensation for services alleged to have been rendered as general superintendent of a corporation. One of the counts sought a recovery on a quantum meruit. The Court says:

> "This case presented a very simple issue, and there should have been no room for error. It should have gone to the jury on the sole question of whether Mr. O'Brien was employed as general superintendent of defendant, under an implied contract of employment for hire, and,

> if so, what was the reasonable value of his services. He was an officer and director of the defendant and could only be entitled to compensation for any services rendered when compensation for his services was provided for, either in the company's articles of association, in its by-laws, *or by resolution of its Board of Directors passed before the services were rendered;* or, *being services outside of his duties as Director or Vice-President, and he was both when the services are said to have been rendered,* whether they were performed at the instance of its directors or an officer having general power 'upon an implied promise to pay for such services, when they were rendered, *under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for or ought to have so intended and understood.*"

In applying the doctrine of the case just cited to the case at bar, we contend that the alleged services were not rendered "under such circumstances as to " raise a fair presumption that the parties intended " and understood they were to be paid for or ought " to have so intended and understood". We have shown that the only foundation for plaintiff's expectation that his services would be paid for, was the alleged guaranty of Knox that he would see they were compensated for. Any understanding that they were to be paid for rested entirely and alone upon the power of Knox to bind the corporation.

But there was absolutely nothing shown on the part of plaintiff that would even tend to prove that Knox as President had any power to bind the corporation by contract.

The record shows admittedly that the corporation adopted no by-laws until September, 1907 (Tr. 248), four years after some of these alleged services were rendered, and the services even if contracted for by him would have been entirely without his authority.

> "The President of a corporation has no power to buy, sell or *contract* for the corporation, nor to control its property, funds or management."
>
> 2 Cook on Corporations, 4th Ed., Sec. 716;
>
> 4 Thompson on Corporations, Secs. 4613, 4617;
>
> Groetlz v. Armstrong S. E. Co., 89 N. W. 21.

In the case cited, the articles of incorporation provided that the managing board of the corporation should consist of a certain number of directors, the by-laws to provide for the duties of the individual officers. No by-laws were adopted. The President attempted to make a contract to pay a commission on a sale of real estate for the corporation. In holding that such contract was not binding on the corporation, the Supreme Court of Iowa quote approvingly the two text writers cited, and say:

> "However, whatever may be his presumptive power in general, we think there can be no controversy as to the rule that, where the general power to make contracts for and manage the business of the corporation is conferred upon the Board of Directors, that power cannot be exercised by the President alone."

During a portion of the period covering the rendition of these alleged services, the plaintiff was Vice-

President of the corporation. No salary attached to that office or to the office of President. The services rendered were not shown to be other than those usually rendered by similar officers in corporations of a like nature at that period and in the neighborhood where rendered. When Dunlap accepted the office of Vice-President he knew that in the absence of the latter as President he would be compelled to perform whatever duties fell to the President and that the latter served without salary. Whatever other services he performed during that period, he voluntarily performed on his own initiative out of an excess of zeal, which while no doubt meritorious, cannot be said to warrant him in violation of well established principles of law, to bind the corporation to pay him thousands of dollars therefor in the absence of any understanding that he was to be paid.

It is further clear that no one expected to pay him for these casual services in and about the settlement of the various claims for damages from the fact that the other directors and officers, Knox, Lynch and Alexander, were all acting and exerting their efforts to do what was best for the corporation in this regard, and what Dunlap did was only natural and in line with his duty as a director and officer of the corporation.

In the case of Caho v. Norfolk & S. Ry. Co., 60 S. E. 640, from the Supreme Court of North Carolina, plaintiff rendered services to the railroad as attorney and President at the request of said com-

pany, and expended money in advertising, which it was alleged was promised and agreed to be paid plaintiff. The Court says:

> "That no cause of action is stated, for that there is no averment that any salary was affixed to the office of President prior to February 27, 1906. The authorities cited by counsel for defendants amply sustain his contention that, in the absence of an express promise *made prior to the performance of the service,* an officer of a corporation cannot maintain an action for compensation; that he cannot sue upon a quantum meruit."

The Court cites 21 Am. & Eng. Ency. of Law, 906, and further says:

> "The authorities are uniform. If the law were otherwise, stockholders and creditors of corporations *would have no protection against confiscation of the corporate property by reckless extravagance, or corrupt combination of officers and directors to impose debts and liabilities for past services.* A stockholder would never be able to know the value of his stock, or a creditor the amount of debts for which the corporation is liable. Where power is conferred by the charter upon directors to elect officers and fix their salaries, the power must be exercised at the same time and not left open for future adjustment. *It is but just to all persons concerned that the expenses incident to operating the business of the corporation, so far as salaries are concerned, shall be fixed and made a matter of record.* This complaint presents a striking illustration of the 'wisdom of the law'."

See also

Notley v. First State Bank of Vicksburg, 118 N. W. 486 (Mich.);

Deal v. Inland Logging Co., 100 Pac. 157 (Wash.);

Gaul v. Kiel & Arthe Co., 118 N. Y. Supp. 225;

Althouse v. Cobaugh Colliery Co., 76 Atl. 316 (Pa.);

McCarthy v. Mt. Tecarte Land & Water Co., 111 Cal. 328.

We expressly call the attention of the Court to the case of

Althouse v. Cobaugh Colliery Co., 76 Atlantic 316.

There the plaintiff, a mining and civil engineer, who was President of the corporation, had performed services for the benefit of the corporation in surveying, procuring rights of way and building a railroad and bridge together with other services, which were admittedly without the line of his official duties.

In holding that he was not entitled to be compensated therefor, the Court said, applying the principle laid down in the case of Brophy v. American Brewing Co., 61 Atl. 123:

> "The plaintiff during the whole period for which he claimed compensation for services was an acting director and a member of the executive committee of the Board of Directors. He came therefore within the reason of the settled

rule that a corporate officer cannot recover compensation for services rendered the corporation *unless there was an express contract of employment before the services were performed.* * * *

"The instruction that there could be no recovery on the basis of a quantum meruit for services rendered was right."

In examining the propositions of law involved in this case in all instances where compensation was allowed to an officer of a corporation for services rendered by him to the same without an express contract as to definite compensation having been first made, the facts showed that the officer was elected to perform the services or requested by the corporation to perform the services after his election, or that his services were constantly engaged at the request of the Board of Directors or of a majority of the corporation.

In those cases naturally the officer would come within the provisions of the rule governing when definite services are performed without a definite sum being stipulated therefor, but which services are performed with the understanding that they would entitle him to some compensation to be rendered in the future. In this case it is clear that whatever services were rendered by the plaintiff were so rendered voluntarily upon his own initiative and there is nothing in the record to show that he did anything more than what other officers of the corporation did without compensation being paid therefor.

And the plaintiff does not attempt to show nor does the record disclose in any respect that any of these services were unofficial in their character or were entirely outside of what might have been expected of him to perform either as Secretary and Treasurer, Vice-President or as a Director of the Board.

The defendant requested the Court to give the following instruction:

> "The jury are instructed that if they believe from the evidence the plaintiff did render services beyond those usually rendered by a Vice-President, Director, Secretary or Treasurer of the defendant corporation, and there was no promise on the part of the defendant to pay therefor; and if you believe from the evidence that there was no understanding or idea upon the part of the directors of the defendant corporation as a body, that the plaintiff was to recover compensation for such services, the plaintiff cannot recover." (Assignment XV.)

The Court refused to give this instruction as presented. It is based upon the law cited in the foregoing cases and is almost an exact expression of the principle of law controlling in this case, if we are right in our contention.

While it is true the Court read this instruction to the jury, it read it with the following modification thereof:

That will be understood with the instructions I have given you before. *You are at liberty to infer*

if you find it proven by a preponderance of the evidence that these services were not intended as a gift.

The language last quoted completely eliminates any action or understanding upon the part of the corporation as a body that plaintiff was to receive compensation, and is entirely inconsistent with the language in the body of the instruction. It practically says:

> "If you believe that there was no understanding or idea on the part of the corporation to pay then plaintiff cannot recover. But you can allow him to recover if these services were not intended as a gift."

There could be no other understanding by the jury of this instruction than that they were at liberty to consider the intention of the plaintiff as controlling to the complete exclusion of any understanding on the part of the defendant as to the gratuitous nature of the services.

We call the Court's attention also to the error of the Court in charging the jury as set forth in Assignment XIV, as follows:

> "That whatever services were rendered by a Director or a Vice-President, within the line of his official duty, or which are necessary to the performance of his official duty, or which are incidental to the performance of his official duty, must be regarded as rendered gratuitously and he cannot recover for them without an express contract entered into before the services were rendered; *but for such services as are not required of an officer, either by law or by any*

by-law of the corporation, and which can be performed by an agent, or by a servant or by an attorney, who need not be a director and who is not a director, these may be considered as non-official duties and as duties beyond *the scope of the employment of an officer.*"

This instruction is vague and uncertain in its character and does not properly state the law. The Court therein instructs the jury what services must be rendered gratuitously by a Director or Vice-President and then goes on to state what may be considered unofficial services, from which no other deduction is to be drawn in the light of the case at bar than that such services are to be paid for whether contended for or not.

If no such deduction is to be drawn, then the instruction is as we have stated, vague, ambiguous and uncertain. If such deduction is drawn then the instruction fails to state the law properly as it eliminates any question of a contract for such unofficial services either express or implied, with the corporation and leaves the jury to the impression that a Director or Vice-President of a corporation may voluntarily render any character of services outside of his official duties, with no understanding that he shall perform the same, and with no understanding that he shall be entitled to compensation therefor, and yet he can hold the corporation liable for his compensation in thousands of dollars as in the case at bar.

This is no more the law with reference to a corporation than with relation to contracts between individuals.

In the case of Mallory Con. Co. v. Fitzgerald, 137 U. S. 96 (34 Law Ed. 608), Chief Justice Fuller cites approvingly the case of Pew v. First National Bank, 130 Mass. 391, 395, as follows:

> "A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them. *It often happens that persons render services for others which all parties understand to be gratuitous.* Thus, directors of banks and of many other corporations, usually receive no compensation. In such cases, however valuable the services may be, the law does not raise any implied contract to pay by the parties who receive the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, *but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and ought to understand that compensation was to be paid for them.*"

The refusal of the Court below to give the following instruction requested by defendant which was in line with the law hereinbefore cited, was error, viz.:

> "The jury are instructed that the plaintiff cannot recover compensation for services rendered in the past if it was never voted him, and if he had on several occasions acted as if nothing were due him from the defendant corporation." (Assignment XIV.)

Nowhere in the record is there any instruction of a similar nature to be found. The instruction is based upon law, and is borne out by the facts in the record, notably the failure of the plaintiff to ever request any compensation for his services until seven years after the first alleged services were rendered; his resigning his office as Secretary and Treasurer with these alleged services uncompensated for according to his theory; his acceptance of the commendatory resolution passed in 1905 voting him "thanks"; his knowledge of the fact that the Board was in funds of $175,000 at one time and paid dividends covering $100,000 while he was a member of the Board.

All these constituted elements tending to show no implied contract to pay and decidedly no knowledge or expectation of payment on part of the corporation and a failure of any right on the part of the plaintiff to exact the same. The jury should have been instructed along the lines proposed. Failure to do so left the jury uninstructed upon a vital point of law and constitutes error.

> "An officer cannot recover a past due salary when it was never voted him and he had on

several occasions acted as though nothing was due him."

Pyper v. Salt Lake Amusement Co., 21 Utah, 57 Pac. 533.

II.

The Court erred in overruling the objection of the defendant to the introduction of any testimony bearing upon alleged services rendered prior to February 15, 1906, on the ground that the claim for services, if any, rendered prior to that time was barred by the Statute of Limitations of the State of Nevada which had been specifically pleaded by the defendant (Tr. 12). (Assignment No. 1.)

It is provided by Section 3718 of the Compiled Laws of the State of Nevada, that

> "Actions other than those for the recovery of real property can only be commenced as follows: * * * within three years * * * An action upon a contract, obligation or liability not founded upon an instrument in writing."

The claim of plaintiff for these alleged services is based upon an oral contract, if any. He could not hope to sustain his claim for any such services rendered prior to the 15th day of February, 1906. Therefore any testimony relative thereto was incompetent and inadmissible.

Plaintiff was questioned as to services rendered during the year 1904. Defendant interposed an ob-

jection on the grounds that the statute ran as to such alleged services; but the Court overruled the objection and permitted all of this testimony to go in (Tr. 22). That this testimony was inadmissible and incompetent would not seem to need citation of authority.

III.

The Court erred in charging the jury as follows:

> "In segregating unofficial from official services, you will consider all the testimony in the case,"

and a little later and in the same connection following with this instruction:

> "There has been read in your hearing from the minutes of the Board of Directors of the corporation for February 15, 1910, a recital to the effect that it is the sense of the corporation that the plaintiff should be allowed some compensation for services therein mentioned. The fact that this admission was made after the performance of the acts mentioned rather than before does not detract from its efficiency as an admission of the fact that the Directors then present stated that the services mentioned in the resolution were without the scope of the official duty of Mr. Dunlap; nor does it detract from this as an admission that at the time the resolution was passed these directors regarded the services not as gratuitous." (Assignment XXIII.)

We contend that this instruction constitutes on its face reversible error in that it is in complete antag-

onism to the law controlling in this case, and to the propositions of law as laid down in the balance of the charge of the Court.

It will be remembered that on the trial, over the objection of the defendant there was admitted in evidence a portion of the minutes of the Board of Directors passed on the 15th day of February shortly before the institution of the action (Tr. 135).

This resolution on its face purported to be an offer of compromise on the part of the Board of Directors of the defendant, as a means of settlement of the alleged claim for services theretofore rendered by the plaintiff and for the purpose of settling the matters then in dispute between the defendant and plaintiff. The whole resolution was read in the presence of the jury and the Court attempted to segregate the portions thereof which were offers of compromise from the alleged recitals concerning the *opinion* of the directors as to whether or not the previous services rendered by Dunlap were meritorious or were worthy of compensation.

In doing so, however, the jury had the full benefit of the illegal evidence as to a proposed compromise and no attempt was made upon the part of the Court to in terms disabuse the minds of the jury relative to the value to be given to such evidence in the charge thereafter given relative to the portion of the resolution which presumptively the jury alone were to consider, and this offer of compromise, such

as it was, could not but have had some effect upon the minds of the jury.

This resolution simply expressed the *opinion* of the Board as to whether the plaintiff was entitled to some compensation or not. That opinion might just as well have been that the plaintiff was entitled to the full compensation thereafter sued for, viz.: $20,500.

If we are right in our contention as to the law controlling in this case, as shown by the authorities hereinbefore cited, the plaintiff could only recover in this action upon either an express contract (which is not relied upon) or upon an implied contract to pay a reasonable compensation for the services rendered, (after proof of their unofficial character) the services being rendered with the understanding on the part of *both* parties that they were to be paid for, even if no definite compensation had been determined upon.

The resolution therefore was incompetent, irrelevant and immaterial, because it is apparent that the offer made therein was entirely without consideration, as the Board of Directors could have had no power to make the payment, which if made would have been voidable, at the instance of the stockholders.

This resolution did not in any manner tend to establish the fact that the corporation had received from plaintiff services which it was legally bound to compensate.

If the Board had resolved to pay and had paid the full amount asked for by the plaintiff (which they might with equal right under the position taken by plaintiff, have done) in any stockholders' action brought to recover the amount against the individual members of the Board, the very question at issue would have been whether the plaintiff had any legal claim against the corporation and surely this resolution reciting the opinions of the Board that he had performed services and that "it was the sense " of the corporation that he was entitled to some " compensation" therefor, could have no weight. The real nature of the services and their real value would be the question to be determined, not the motives actuating the individual directors in arriving at a conclusion to vote plaintiff some compensation; motives that might perhaps have been far from a consideration of the interests of the real parties to be considered, the stockholders.

We maintain that this resolution even as skeletonized should never have been permitted to go to the jury as evidence, under the principle of law controlling in this case, and hold that for its alleged admission alone the case should be reversed. (Assignment X.)

"Otherwise", we may say in the language of the Supreme Court of North Carolina in that case of Coho v. Norfolk & S. Ry. Co., Idem:

> "stockholders and creditors of this corporation *would have no protection against confiscation of the corporate property by reckless extravagance,*

> *or corrupt combination of officers and directors to impose debts and liabilities for past services.''*

That the Board of Directors in this instance did not vote the full amount asked by the plaintiff but sought to conserve the interests of the Company does not alter the principle controlling the situation.

For these reasons the giving of the instruction complained of was error. It was based on incompetent evidence; and was therefore not an admissible instruction.

> Latourette v. Meldrum, 90 Pac. 503;
> Dallas Consol. Elec. St. R. Co. v. English, 93 S. W. 1096;
> First Natl. Bank v. Brown, 116 N. W. 685.

Immediately following the Court tells the jury that the admission embodied in the resolution is not detracted from by reason of the fact that it was made after the services were performed, nor did that fact detract from it as an admission that *at the time the resolution was passed, the directors regarded the services as not gratuitous.*

And further tells the jury that while this admission did not bind the corporation, to compensate the plaintiff, yet at the same time they could consider it

> ''in determining what was the *understanding* of the Board of Directors as to whether the services were within or without the scope of Mr. Dunlap's duties as Secretary and Treasurer, or as Director and Vice-President.''

These instructions taken in conjunction are inconsistent for in the one case the jury is told they are to determine from the *testimony* what services were unofficial and what official. And in the next breath are told that they are to consider that vague, uncertain and shadowy thing, the *understanding* of the Board as to whether the services were within the official scope of the plaintiff or not.

The first statement properly expresses the law. The latter instruction should no more have been given than the resolution upon which it was based should have been allowed to go in evidence, and for the same reasons.

If we are right in our contention as to the law in this case, no understanding or admission involved in this resolution could have any weight or control in binding the corporation.

If the law be that the implied promise to pay and expectation of payment must exist on the part of both plaintiff and defendant *prior* to the rendition or *during* the rendition of services, how then can any resolution passed years after the services were rendered to the effect that these services were without the scope of the plaintiff's employment, and that the sense of the Board is that plaintiff should have some compensation therefor, be construed into an admission that the Board always understood and intended to pay for the services some time and accepted them upon that understanding?

For it could only be upon such a construction that this instruction to the jury can be sustained.

We submit that no such construction can be placed upon such resolution and the same cannot therefore be deemed an admission binding on the part of the defendant corporation as stated in the instruction.

See the case of

Metropolitan El. Ry. Co. v. Kneeland, 24 N. E. (N. Y.) 383,

where the directors of a railway company voted without authority to pay their president a salary and at a subsequent meeting assumed to authorize him to issue and negotiate the company's notes in payment thereof. Some of the notes passed into the hands of bona fide purchasers, and the company thereupon brought suit against its president and directors for the value of the notes issued.

The action was held maintainable against the directors who voted to confer the power, and the Court of Appeals say:

> "Those who voted for the resolution which in form authorized one of their number to issue and negotiate notes of the plaintiff, assumed to authorize, and, by authorizing, caused some of the notes in question to be issued and negotiated. They had no power, express or implied, to pass that resolution, or its predecessor which provided a salary for the president. They could not thus give away the property of the corporation. They could not bind the stockholders by voting to appropriate the assets of the company to an illegal purpose."

See also to the same effect the case of

Doe v. Northwestern Coal & Transportation Co., 78 Fed. 62,

hereinbefore cited.

We contend that the allowing of this resolution in evidence (Assignment X) and the giving of the instruction complained of, based thereon constitute reversible error.

For these reasons as well as for all of the errors assigned, we submit that the judgment of the lower Court should be reversed.

RUFUS C. THAYER,
Attorney for Plaintiff in Error.

No. 2030

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MONTANA-TONOPAH MINING COMPANY (a corporation),
Plaintiff in Error,

vs.

R. P. DUNLAP,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Nevada.

BRIEF FOR DEFENDANT IN ERROR.

McIntosh & Cooke,
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Tonopah, Nevada.
Attorneys for Defendant in Error.

Filed this.....day of September, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Contents

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Statement.

A brief summary of the case as made, and of the theory and principles upon which the same was presented and tried, may we assume be permitted on behalf of the defendant in error.

This is an action in implied assumpsit,—upon a quantum meruit,—for the reasonable value of services claimed to have been rendered to plaintiff in error by R. P. Dunlap, at Tonopah, Nevada, between on or about January, 1903, and on or about February 15, 1910, a period approximating seven years. Defendant in error alleged that the reasonable value of these services was the sum of $20,500.00 and prayed judgment for that amount. (Record, p. 2.)

During said period of seven years defendant in error was officially connected with plaintiff in error as follows: From January, 1903, until February 21, 1905, as secretary and treasurer, at an agreed salary, for his services as such secretary and treasurer, of $150.00 per month from January, 1903, to October 15, 1903, and $200.00 per month from October 15, 1903, until February 21, 1905,—at which time his incumbency of the office of secretary and treasurer ended.

From September, 1903, until February 15, 1910, as a director of the company,—and from September 11, 1906, until February 15, 1910, as vice-president of the company. During this period neither the office of director nor that of vice-president carried any salary fixed either by the charter, by-laws or any prior resolution of the stockholders or directors of the corporation.

The plaintiff in error in its answer (Record, p. 10) denied all liability for services rendered by Mr.

Dunlap,—alleging (Record, p. 12) that he performed no services for or on behalf of the corporation save those within the scope of his duties as an officer of the company;—and plead the Statute of Limitations as running from February 15, 1906;—and on the issues as thus made trial by jury was had.

On the trial, the defendant in error asserted and offered evidence tending to prove that the services rendered by him,—for the reasonable value of which this action was brought,—were services clearly beyond and outside the scope of his duties as secretary and treasurer, director or vice-president of the corporation. (Record, pp. 20, 21, 23, 24, 25, 35, 36, 37, 38, 39, 40, 41, 42, 46, 84, 85, 139, 140, 142, 143, 145, 146, 172, 178, 209, 210, 250, 254, 261, 276, 283, 284, 288.) *Particularly* Record, p. 135 and pp. 293-294,—and Record, p. 29, lines 5 and 6;—that the said services were not volunteer or gratuitous, and that both he and the company understood and expected that the same were to be compensated. (Record, pp. 58, 67, 68, 70, 98, 102, 103, 115, 116, 117, 118, 119, 120, 267, 274, 275) and *particularly* Record, p. 135 and pp. 293-294.)

The jury found a verdict in favor of defendant in error in the sum of seven thousand five hundred ($7500) dollars and the case is brought to this Court upon writ of error.

Argument.

QUESTIONS INVOLVED.

It will be readily observed that the only questions presented or involved in this case were:

1. Can an officer or director of a corporation recover on implied contract compensation for services by him rendered to the company, when such services are without the scope of his duties as such officer or director—are not gratuitous and are rendered under such circumstances as raise the presumption that the company knew or ought to have understood that he was to be paid for them?

2. Were the services sued upon by the defendant in error outside the scope of his official duties as an officer or director of the corporation, plaintiff in error, and if so were they gratuitous or were they rendered with the expectation on the part of both parties that they were to be paid for, or under such circumstances as raises the presumption that the plaintiff in error ought to have understood that they were to be paid for?

We maintain that both queries must be answered in the affirmative,—for

The first is sustained and conclusively settled and established beyond doubt or cavil by the great weight of modern authority, and

The second is established by the evidence, and has been affirmatively answered by the jury in full view of all that evidence,—it being the peculiar and ex-

clusive province of the jury to pass upon and determine such disputed questions of fact.

We cite:

Ruby Chief Mg. & Mllg. Co. v. Prentice, 52 Pac. 210,

wherein the Court says:

> "The evidence *tends* to show, and so the *jury must* have *found,* that the services performed were not such as devolved upon the plaintiff * * * as a director, but were clearly outside thereof, * * *. The testimony being in conflict as to these questions of fact, we must accept the verdict of the jury as conclusive."

Also:

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U. S. 405; 38 Law Ed. 493; 14 Sup. Ct. Rep. 632.

> "It was the peculiar province of the jury, under proper instructions from the Court as to the law governing plaintiff's right to recover for the services claimed to have been rendered, to determine from the evidence whether or not he was entitled to compensation therefor."

We take the liberty of assuming that the honorable Court will not disturb the verdict of a jury under conflicting evidence on disputed questions of fact, unless from that evidence it be made to appear that the trial Court committed errors of law, and then only in so far as such errors are assigned in compliance with the rule. (Rule 11.)

OFFICER OR DIRECTOR MAY RECOVER ON IMPLIED CONTRACT.

"By the overwhelming weight of authority, the doctrine that the directors and other managing officers of a corporation are not entitled to compensation, in the absence of express provision or agreement therefor,— does not apply to unusual or extraordinary services,—that is, services which do not properly pertain to their office, and are rendered by them outside of their regular duties. * * * the law will imply a promise, in the absence of any special agreement, to pay what they are reasonably worth."

Clark & Marshall, Private Corporations, p. 2053, Sec. 671c.

To same effect we cite:

Morawetz, Private Corporations, Sec. 508;

10 Cyc., pp. 900-901 (5);

3 Thompson on Corporations, Sec. 4387;

2 Cook on Corporations, 6th Ed., pp. 1929 et seq., Sec. 657.

The Supreme Court of the United States has twice passed upon this question and in both decisions supported the doctrine expressed in the text quoted supra.

Fitzgerald and Mallory Construction Co. v. Fitzgerald, 137 U. S. 98; 34 Law Ed. 608 (at p. 613, last paragraph in column 2); 11 Sup. Ct. Rep. 36;

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U. S. 405; 38 Law Ed. 493; 14 Sup. Ct. Rep. 632.

The first named case is a leading case upon the subject,—and the Court, speaking by Mr. Chief Justice Fuller, says (parentheses ours):

> "To render such party liable as a debtor under an implied promise, it must be shown, not only that his services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and *ought to understand* that compensation was to be paid for them. Tested by this rule, we think that the Court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. *It could not* properly *have been held as matter of law* that *he was not* so entitled",

and at page 613, col. 2 (34 Law Ed.):

> "The Court instructs the jury that 'if Fitzgerald', the plaintiff, 'acted as superintendent, treasurer or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant' (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services were reasonably worth"—(a much broader ground than Court ventured to take in case at bar).
>
> "If strict verbal accuracy was not observed in giving this direction, in view of the general rule as to compensation for official services rendered

> in the absence of a specified compensation fixed or agreed upon, yet we do not think, taking all parts of the charge upon that subject together, that any substantial error was committed. The evidence *tended* to establish that Fitzgerald acted * * * in the discharge of duties outside of those assigned to the treasurer as such'',

and then states, as per supra, that it was

> "fairly left to the jury to determine whether Fitzgerald * * * was entitled to claim compensation therefor".

This decision is cited with approval by a great majority of the cases on this subject, and we cite to same effect:

Gumaer v. Cripple Creek etc. Co., (Colo.) 2 Colo. 85; 90 Pac. 81;

Rogers v. Hastings & D. Ry. Co., (Minn.) 22 Minn. 25;

Deane v. Hodge, (Minn.) 35 Minn. 146; 27 N. W. 917;

Cheney v. Lafayette Ry. Co., (Ill.) 68 Ill. 570 (at p. 575); 18 Am. Rep. 584;

Greensboro etc. Turnpike Co. v. Stratton, (Ind.) 120 Ind. 294; 22 N. E. 247 (at p. 248, col. 2);

Santa Clara Mg. Assn. v. Meredith, (Md.) 49 Md. 389; 33 Am. Rep. 264;

Severson v. Bimetallic Extension Mg. & Mill Co., (Mont.) 44 Pac. 79;

Ruby Chief Mg. & Mill. Co. v. Prentice, (Colo.) 25 Colo. 4; 52 Pac. 210;

Citizens National Bank v. Elliott, (Iowa) 55 Iowa 104; 7 N. W. 470; 39 Am. Rep. 169 ("Third");

Huffaker v. Kreiger's Assignee, (Ky.) 53 S. W. 288;

Henry v. Rutland etc. Co., (Vt.) 27 Vt. 435;

Shackleford v. New Orleans, (Miss.) 37 Miss. 202 (at p. 209);

Ten Eyck v. Pontiac etc. R. R. Co., (Mich.) 3 L. R. A. 378 (and footnote);

Toponce v. Corinne etc. Co., (Utah) 6 Utah 439; 24 Pac. 534 (as affirmed by Corinne etc. Co. v. Toponce, supra);

Taussig v. St. Louis etc. Ry. Co., (Mo.) 65 S. W. 969 (at 4 and col. 2, pp. 970 et seq.);

Railroad Co. v. Sage, (Ill.) 65 Ill. 328;

Edwards v. Fargo & So. Ry. Co., (Dakota) 4 Dak. 549;

Brown v. Creston Ice Co., (Iowa) 85 N. W. 750;

New Orleans etc. Co. v. Brown, (La.) 36 La. Ann. 138; 51 Am. Rep. 5;

Bartlett v. Mystic River Corp., (Mass.) 151 Mass. 433;

McDowall v. Sheehan, (N. Y.) 13 N. Y. Supp. 386;

Outterson v. Fonda Lake Paper Co., (N. Y.) 20 N. Y. Supp. 980;

Wood v. Lost Lake Mfg. Co., (Ore.) 23 Ore. 20; 37 Am. St. Rep. 651;

Bassett v. Fairchild, (Calif.) 132 Cal. 637; 52 L. R. A. 611; 64 Pac. 1082 (at 1084); 61 Pac. 791 (same case);

Chandler v. President etc. Monmouth Bank, (N. J.) 13 N. J. L. 255 (Green's Reports, Vol. 1);

Flynn v. Columbus Club, (R. I.) 21 R. I. 534 (at p. 536);

Watts v. West Va. So. R. Co., (W. Va.) 48 W. Va. 262.

We thus find the English or common law rule—the so-called "strict" rule, modified out of existence in this country, and the so-called "liberal" rule adopted and followed in practically every state in the Union where our investigation of the books discloses any decisions extant upon the subject,—and saving in the State of Pennsylvania, which last named state flies in the face of the United States Supreme Court and the unbroken unanimity of the Courts of the other states referred to,—and appears to still adhere to the "strict" or English rule.

Althouse v. Cobaugh Colliery Co., (Pa.) 76 Atl. 316.

The case of Taussig v. St. Louis & K. Ry. Co., supra, declares that an officer or director may recover on implied contract for such services:

> "when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood."

To same effect we cite:

Deane v. Hodge, supra;

Fitzgerald etc. Construct. Co. v. Fitzgerald, supra.

The other cases cited, supra, are also to the same effect.

Our understanding is that in the case at bar plaintiff in error relied upon the English or strict rule, and proceeded upon the theory that an officer or director cannot under any circumstances recover for services on implied contract or in the absence of prior express agreement, either by charter provision, by-law or proper resolution; that all services rendered by an officer or director are presumed to be voluntary and gratuitous, and further that his authority to act, his agency in fact, must be evidenced by written memorandum. In this connection, as well as upon other points involved in the case at bar, the opinion of the Court in

Santa Clara Mg. Assn. v. Meredith, supra,

is important.

The Court says:

> "If a president or director of a corporation renders services to his corporation which are not within the scope of, and are not required by, his duties as president, or director, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise."
>
> "Agency for a corporation is not required to be shown by a resolution of the board of di-

rectors or other written evidence, but it may be inferred from facts and circumstances."

"All the prayers of the appellant asked instructions that plaintiff was not entitled to recover unless the jury should find an express contract of employment of the plaintiff by the defendant. We have shown that his employment may be inferred from facts and circumstances, and the appellant's prayers *were* therefore *properly rejected.*"

"There were facts and circumstances in evidence from which the jury were at liberty to infer that the appellee was employed by the appellant in respect of obtaining a patent for the lands. * * * There is evidence in the record tending to prove that these services were either authorized by the corporation previously to their rendition, or were ratified by it after they were performed, and that they were such services as were not required of the appellee in the discharge of his duties *as a director—all these matters were left to the finding of the jury* * * * and if found in his favor he was entitled to recover a reasonable compensation for his loss of time and for services rendered."

Also the expressions of the Court in its opinion in

Bassett v. Fairchild, supra,

on which, with the case of Althouse v. Cobaugh Colliery Co., supra, the plaintiff in error largely relies. In the Bassett v. Fairchild case, the Court (at p. 1084, 65 Pac.) says:

"But respondents contend that under the general law, established by judicial decisions, there can be no lawful allowance to an officer of a corporation for services, no matter what their character and value, where the amount of the

compensation *had not been fixed prior to the rendition of the services.* * * * Most of the authorities cited by respondents *merely* declare the rule that *a director as such,* without some previous understanding, is not entitled to pay for services which are within the ordinary duties to be expected of him as director, * * * for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing", citing

Fitzgerald & M. Constr. Co. v. Fitzgerald;

Rogers v. Hastings etc. Ry. Co.;

Henry v. Rutland etc. Co.

Also the opinion of the Court in Deane v. Hodge, supra, as follows:

"A man has a right to render a voluntary service * * * without remuneration, and if he does he cannot afterwards recover for such services, * * * but it does not follow that his mere neglect to demand a specific agreement for compensation * * * necessarily deprives him of the right to a reasonable remuneration * * *. Where the evidence fails to disclose an express agreement or understanding, the law may imply a contract from the circumstances or acts of the parties; and where there is nothing from which a contrary intention or understanding is to be inferred, it is a just and reasonable presumption that he who has received the benefit of the services * * * of another impliedly undertakes to make compensation therefor."

Also the Court's statement in Shackleford v. New Orleans etc. Ry. Co., 37 Miss. 202, supra (at page 209), to wit:

> "Unless there is some agreement or understanding, express or implied, to the contrary, the law will imply a contract on the part of such company with their agent, whether he be a director or a stranger, that he shall receive for such service in the business of such agency whatever compensation he reasonably deserves to have therefor. And on proof of the value of his services, *the jury should find accordingly.*"

And in New Orleans etc. Co. v. Brown, supra, viz.:

> "The groundwork of plaintiff's argument is that jurisprudence has settled the rule that directors and other officers of corporations * * * are presumed to act gratuitously and cannot claim a salary on the theory of an implied contract.
>
> "But it must not be presumed that the rule is absolute in all cases; some exceptions must be recognized, especially where the duties to be performed are onerous or toilsome. The *services* of the *managing director* of a corporation * * * must be conceded to be of that class."

Also in

> Gumaer v. Cripple Creek etc. Co., (Colo.) 90 Pac. 81, supra,

where the Court says, quoting from Corinne etc. v. Toponce (supra):

> "Under the later and better reasoned cases, for such services,—that is, services performed by a director clearly outside of his duties as

> such director, and *in the nature of* the *duties of a general manager or superintendent,*—a recovery may be had either under an express or implied contract.
>
> "For services clearly outside a director's duties, *as a director,* we think there may be a recovery as upon quantum meruit, and in accordance with what * * * is denominated the 'more liberal rule'."

These cases go to the extent of holding the direct opposite of the rule contended for by plaintiff in error, and declare that in the *absence* of contract or express agreement evidencing that such services were understood and agreed to be gratuitous, such officer or director may recover, and on evidence of the value of such services "the jury should find accordingly",—also that services in the nature of those performed by a manager, managing director, superintendent, are clearly outside the scope of a *director's duty as such director.*

[illegible] of the "as-

As to what the understanding was as to character of service to be rendered see Rec. 250.

Re: Assignments of Error.

OBJECTIONS TO CONSIDERATION HEREIN OF ASSIGNMENTS REGARDING COURT'S INSTRUCTIONS TO JURY.

Preliminarily, we object to this Honorable Court's considering those so-called assignments of error

which have to do with the instructions given by the lower Court, being assignments numbered XVIII and XIX (Record, pp. 358-359) and No. XXIII (Record, p. 362), upon the ground and for the reason that no proper or other exception was taken, as required by the rules of Court, to the instruction set forth in assignment numbered XIX, and no exception whatever was taken, as required by the rule or otherwise, to the instructions set forth in assignments numbered XVIII and XXIII, and in support of our statement and contention in this behalf we respectfully refer the Honorable Court to Record page 345 and Record page 346, whereon are found the only exceptions taken to the instructions given by the Court, to wit:

"Mr. THAYER. Perhaps I am over-nice about "the wording, but I would like the benefit of an "exception to that instruction" (Record, p. 345). (Reason for exception given on Record, p. 346.)

This exception referred to the instruction set forth in assignment of error numbered XIX.

There were no other exceptions taken, either as required by the rule or at all, to the instructions of the Court or to those particular instructions set forth in assignments of error numbered XVIII and XXIII, the only other exception being found on Record page 346 to the refusal of the Court to give such of defendant's requested instructions as were declined. For these reasons, we respectfully submit that plaintiff in error is not in law or under the

rules or practice of this Court entitled to have said assignments of error considered.

Circuit Court Rule 22.

> "The cases are uniform to the effect that the appellate Court will not permit a party to lie by without calling the attention of the trial Court to the particular errors in law complained of, and then for the first time seek to take advantage of it in a Court of review."

Ruby Chief Mg. & Mllg. Co. v. Prentice, supra.

The rule is salutary and proper.

ASSIGNMENT NO. I.

The objection of the plaintiff in error to the evidence, the admission of which is complained of in assignment numbered I, was stated to be with the privilege of moving to strike all such evidence after the case is all in (Record, p. 22). No motion to strike was made, as appears by the record.

The statute was suspended in this case by virtue of the acknowledgment of the debt or obligation, made by plaintiff in error on February 15, 1910. (Record, pp. 293-294.)

> "The Courts, without intending to thwart, but rather to give effect to, the true intention of the statute (of limitations) began at an early day to hold that where a debtor expressly promises to pay a pre-existing debt, or *acknowledges its existence* under such circumstances that a *promise to pay* it can be *implied,* the statute is suspended up to that date, and begins to run

anew from the date of such new promise or acknowledgment."

Wood on Limitations, p. 160, Sec. 64.

An acknowledgment of the justice of the claim, without anything more, is sufficient to remove the statute bar.

Bailey v. Bailey, 14 S. & R. (Penn.) 195;
Tichenor v. Colfax, 4 N. J. L. 153.

"The theory upon which the Courts proceed is that the old debt forms a good consideration for a new promise, either express or implied, and that * * * admission of the debt * * * carries with it an implied promise to pay."

Wood on Limitations, p. 162, Sec. 64.

In assumpsit for work and labor, the statute was pleaded; evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar and when a person "up the bay" should come to town he would have the business settled,—held to defeat operation of statute.

Poe v. Conway's Admr., 2 H. & J. (Md.) 307;
Wood on Limitations, p. 166; note to Oliver v. Gray, 1 H. & G. (Md.) 204.

Stating the rule,—and holding that evidence offered to prove acknowledgment is *proper to be submitted to the jury.*

"If more than six years have elapsed since the making of the original promise or since the cause of action accrued, it must appear that the

defendant has made a new promise to pay * * *. Such promise may be express or implied, and a *jury* will be authorized and *bound to infer* such *promise* from a clear, unconditional and unqualified admission of the existence of the debt at the time of such admission, if unaccompanied with any refusal to pay, or declaration indicative of any intention to insist on the statute of limitations as a bar."

Sigourney v. Drury, (Mass.) 14 Pick. 390;

Wetzell v. Bussard, 11 Wheat. (U. S.) 315;

Moore v. Bank of Columbia, 6 Pet. (U. S.) 92;

25 Cyc., p. 1325, VIIa.

SERVICE CONTINUOUS.—STATUTE DID NOT BEGIN TO RUN UNTIL SERVICE ENDED, FEBRUARY 15, 1910.

"The instructions asked by the appellant and refused by the Court were to the effect that, if the appellee entered into the service of the decedent and continued therein up to the time of his death, without any special contract as to the terms or worth of the service, or under an agreement that she should be paid the reasonable value of her services, and with no agreement as to the length of time the service should continue, then there could be no recovery by her for more than six years next before the decedent's death. *These instructions were properly refused.* * * * When there is no certain time for payment nor when the service shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services have ended."

Graves v. Pemberton, 3 Ind. App. 71; 29 N. E. 177 (at p. 178).

To same point we cite

Carter v. Carter, 36 Mich. 207.

PAYMENT FIXED ON CONTINGENCY PENDING WHICH STATUTE DID NOT BEGIN TO RUN.

The understanding in the case at bar was that defendant in error should be paid for these services upon the happening of a certain event or contingency,—that is to say, when the plaintiff in error had its mill plant completed and equipped and "got " into condition to do it",—"was out of debt and " making money".

(Record, pp. 73, 102, 103, 119 and 120.)

> "Where compensation is not to be made until a certain date, or the happening of a certain event, full compensation may be recovered at law for all services performed prior to that date, as the statute of limitations in such case does not begin to run until the period so fixed."

Cooper v. Colson, 105 Am. St. Rep. 660 (at p. 664); 66 N. J. E. 328; 58 A. 337.

WHERE DELAY INDUCED BY DEFENDANT, STATUTE DOES NOT RUN.

The delay in insisting upon payment for the services rendered by defendant in error was induced by plaintiff in error, its officers, president and agent,—and defendant in error relied upon this inducement. (Record, p. 73.)

"Where the insurer or its agent does or says anything to warrant the assured in *believing* that his claim will be settled, and which induces him to delay bringing an action, the insurer cannot allege breach in that respect. But the circumstances must have been such as fairly to induce delay and as would operate as a fraud upon the part of the insurer to set up such delay in avoidance of liability. Forfeitures are not favored by the law and slight evidence of a waiver will be deemed sufficient."

Wood on Limitations, 3rd Ed., p. 108, Sec. 49; p. 109, Sec. 51.

II.

The grounds of the objection to the evidence complained of (Record, p. 71) in assignment numbered II, were:

1. That there was, at the time the testimony was objected to, no evidence that Charles E. Knox was authorized to employ or to agree with plaintiff for compensation.

In this the plaintiff in error was mistaken, for there was then in the record evidence that Mr. Knox was president and general manager of the company (Record, p. 29, p. 58, pp. 60, 62), and that he had general supervision over the business affairs of the company (Record, p. 61); that Mr. Knox had in charge the employment of all people other than those employed in and about the mine (Record, p. 67); that he either rejected or accepted every contract that was made (Record, p. 69), and later Mr.

Knox testified to the same effect (Record, p. 271; also p. 291).

The testimony, both before and after the admission of the evidence complained of, showed a course of conduct on the part of Mr. Knox as president and general manager of the company, and acquiescence in and acceptance by the company, of all his acts, in the general control of the company and its affairs sufficient to establish the general scope of his authority and its being broad enough to authorize him to contract with Mr. Dunlap for compensation for extra services rendered,—an authority sufficiently shown to entitle Mr. Dunlap to rely on it. Further, it tends to show the understanding of the company with regard to the question of fact as to whether it was expected that Mr. Dunlap should be paid for the extra services claimed, and was therefore admissible as evidence for the jury to consider.

2. That the agreement by Mr. Knox for compensation was void as without consideration and made after the rendition of the services sued upon.

The authorities cited, supra,—all of them,—dispose of the objection that the agreement was void by reason of the fact that defendant in error was an officer and director when the services were rendered.

The evidence shows consideration, in that defendant in error waited and agreed to wait for his com-

pensation until after the company was making money (Record, p. 120). Further, plaintiff in error on cross-examination elicited the same testimony which he complains of (Record, p. 117, p. 120). The Court in its ruling states the rule correctly (Record, pp. 71-72).

III.

The evidence complained of in assignment III was limited by the question, viz.:

Q. "Are you acquainted with and do you have a " knowledge of the value of services in that section " of the country during the time that is embraced in " your complaint?

A. "Yes, sir."

Q. "Services of the character which you have " testified that you rendered during the time em- " braced within your complaint?"

(Record, p. 74.)

There is no objection to the evidence appearing in the record,—and the exception, though not grounded and if it may be dignified as being a proper exception and one that can be considered, appears to have been taken after the evidence complained of was in (Record, p. 75).

Later the question was asked and limited and answered, without objection or exception (Record, p. 75, lines 10 to 17 inclusive). So error, if any, was harmless,—and at all events no legal or proper exceptions were taken to it.

IV.

Objection to the question, the sustaining of which defendant in error complains of in assignment IV, was proper on the ground stated in the objection, viz.: that it was not proper cross-examination (Record, p. 82). There is no direct examination in the record on which such a cross-examination could be properly predicated.

Also that it does not meet any issue in the case. (Record, p. 82.)

V.

There is no basis for this so-called assignment of error No. V, in that the Court changed its ruling sustaining plaintiff's objection to the admission of the portion of the minutes referred to, and same was admitted in evidence and read into the record. (Record, pp. 255-256.)

VI, VII, XXI and XXII.

Assignments of error numbered VI, VII, XXI and XXII are all based upon the same subdivided grounds of error and are therefore in this brief here discussed as one, for the reason that the argument and authorities run identically to each of these assignments and each subdivision thereof.

Subdivisions (1), (2), (3) and (4) of Assignments VI, VII and XXII and (2), (3), (4) and (5) of Assignment XXI, have to do with questions of fact.

For the Jury:

To the point that: the question as to whether the services were intra or extra official,—the question as to whether the defendant in error was employed by plaintiff in error to perform such services,—the question whether the parties understood the same were to be compensated,—the question whether there was an implied contract to pay for them: are questions of fact to be submitted to and determined by the jury on the evidence,—we cite:

7 Thompson on Corporations, Sec. 8582;
Henry v. Rutland etc. Co., supra;
Santa Clara etc. Assn. v. Meredith, supra;
Fitzgerald etc. Construction Co. v. Fitzgerald, supra;
Chandler v. President etc. Bank, supra;
Felton v. West Iron Mt. Mg. Co., 40 Pac. 70;
Severson v. Bimetallic etc. Co., supra;
Corinne etc. Co. v. Toponce, supra;
Ruby Chief Mg. & Mllg. Co. v. Prentice, supra.

In the last named case the Court says:

> "The evidence *tends* to show, and so the jury must have found, that the services performed were not such as devolved upon the plaintiff * * * *as a director,* but were clearly outside thereof and in the nature of the duties of a general manager * * *.
>
> "Under the later and better reasoned cases, for such services a recovery may be had either under an express or implied contract * * * The testimony being in conflict as to these questions

of fact, we must *accept the verdict of the jury as conclusive.*

"The language of the exception to the charge was as follows:

" 'To the giving of said instructions and each paragraph thereof, said defendant, by its counsel, then and there duly excepted.'

"The cases are uniform to the effect that the appellate Court will not permit a party to lie by without calling the attention of the trial Court to the particular error in law complained of, and then, for the first time, seek to take advantage of it in a Court of review."

Re: Character of Exception.

"There were facts and circumstances in evidence from which the jury were at liberty to infer that the appellee was employed by the appellant in respect of obtaining a patent for land * * *. There is evidence in the record *tending* to prove that these services were authorized * * * or were ratified * * * and that they were such services as were not required of the appellee in the discharge of his duties *as a director. All these matters* were *left to* the finding of the *jury* * * * and if found in his favor he was entitled to recover * * * compensation."

Santa Clara Mg. Assn. v. Meredith, supra.

"We think that the Court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly have

been held as matter of law, that he was not so entitled."

Fitzgerald & M. Constr. Co. v. Fitzgerald, supra.

"It was the peculiar province of the jury * * * to determine from the evidence whether or not he was entitled to compensation. * * *

"The jury having found for the plaintiff * * * and the judge who heard the case in the Court below having refused to set the verdict aside, the Court refuses to disturb such verdict."

Corinne etc. Co. v. Topence (U. S.), supra.

The *agency* may be inferred from facts and circumstances.

Ten Eyck v. Pontiac etc. Co., supra (and footnote);

3 Thompson on Corporations, Sec. 4387 (last part of p. 3228).

The motion for an instructed verdict was made at the close of the evidence of and the resting of his case by the defendant in error (Record, p. 147).

To the point that the refusal of the Court to grant the motion for an instructed verdict for the reason that the plaintiff in error had not rested its case when the motion was made, but afterwards went on and proceeded to introduce evidence in its own behalf,—and submitting that it is conclusive on the point, we cite:

Mo. Pac. R'd Co. v. Charless, 7 U. S. App. 359 (at p. 376).

We submit that these questions were properly left to the jury and that the Court committed no error in denying the motion of plaintiff in error for a directed verdict, as assigned in assignment of error No. VI (Record, pp. 351-352).

NONSUIT WOULD HAVE BEEN IMPROPER.

To the point that the motion by plaintiff in error (assignment of error No. VII, Record, p. 353) for nonsuit was properly denied we cite:

> Cases last cited, supra, and particularly
> Felton v. West Iron Mt. etc. Co., supra;
> Corinne etc. Co. v. Topence, supra;
> Severson v. Bimetallic etc. Co., supra.

In the last mentioned case the Court says:

> "The evidence also *tended* to show that it was *understood by the corporate officers* that these were services that should be paid for by the corporation, * * *. The Court therefore *erred in granting* the *nonsuit,* as there was evidence *tending* to prove all the material allegations of the complaint."

In

> Mo. Pac. R'd Co. v. Charless, 7 U. S. App. 359,

at p. 375 of opinion, the Court, speaking by Mr. Justice Hawley, says:

> "When the plaintiff had closed his testimony and rested his case, counsel for the defendant moved the Court for an order * * * for the nonsuit of plaintiff." * * *

> "It has been repeatedly decided by the Supreme Court that Courts of the United States have no power to order a peremptory nonsuit against the plaintiff's will." (Citing U. S. cases.)

The foregoing situation was precisely the same as obtained in the case at bar.

We therefore submit that order of nonsuit would have been improper.

Subdivision (5) of assignments VI, VII and XXII, and (6) of assignment XXI, are ambiguous for in that it by inference suggests that defendant in error was at all times mentioned in his complaint under an agreed salary, which was paid to him,—while the answer of plaintiff in error and the evidence is that he was under such agreed salary only as secretary and treasurer and only until February 21, 1905, and thereafter received no salary,—and further ambiguous in that it assumes what the evidence was as to the right of defendant in error to recover compensation for services extra-official. This was the province of the jury to determine. The subdivision (5) has no merit.

Subdivision (6) of assignments numbered VI, VII and XXII and (7) of assignment XXI, also falls under the same rules as are applied in the argument, supra, regarding subdivisions (1), (2), (3) and (4),—also argument, supra, regarding assignment numbered I; also under the general rule and authorities as applied and cited, supra, re right

of officer and director to recover on implied assumpsit, as upon quantum meruit for extra-official services.

It also was for the jury to determine as a fact, under all the evidence.

VIII.

There is no basis for this so-called assignment VIII, in that the record shows (Record, p. 187) that in law the exception was nullified and withdrawn by the Court's statement that before the ruling became final it would like further information on the exception, and counsel's statement that he would reach it in another way. The Court will take judicial notice of the fact that assessments are a matter of written record, and the record here discloses no attempt to justify non-production of the written record of this assessment, or certified copy thereof, so as to justify admission of secondary oral evidence in the premises. Defendant in error did "reach it in another way". Mr. Lynch, one of its witnesses, testified on the same subject (Record, pp. 238 et seq).

IX.

There is no basis for this so-called assignment of error No. IX.

The evidence to which the question was directed was brought out on cross-examination, by plaintiff in error, of the witness Dunlap (Record, p. 99, pp. 112-113), and under elementary principles and rules

of evidence could not be rebutted by plaintiff in error in his evidence in chief. The Court correctly stated the law in his ruling (Record, p. 247).

X and XI.

The Court committed no error in admitting in evidence (Record, p. 292) the portions of the resolution (Record, pp. 293-294) adopted by the plaintiff in error and appearing in its minutes, as complained of in assignments numbered X and XI.

As is truly said in the opinion of the lower Court (Record, p. 372), denying the motion of plaintiff in error for new trial:

> "The resolution as admitted was no more than an admission by the Board of Directors that plaintiff had rendered certain extra official services, for which he was entitled to some compensation. These were clearly admissions of fact, made because defendant believed them to be true."

And we reiterate and cite on this point the authorities cited by the Court (Record, pp. 372-373), to the effect that "the admission of any distinct fact " made eo animo is competent, though made in the " course of proceedings for compromise".

2 Chamberlayne on Evidence, Sec. 1452 (at p. 1840.

The exception to this evidence was taken upon the ground, inter alia, that it was "for the purpose of compromise" (Record, p. 132).

(The other grounds of exception are disposed of by argument and authorities, supra.)

As to the exception on ground that it was "for purpose of compromise", we quote:

> "Should it appear doubtful as to whether a certain statement or offer is, on the one hand, a compromise offer, or, on the other, an admission of the existence of an independent fact, the presiding judge is justified in leaving the whole matter to the jury under appropriate instructions."
>
> 2 Chamberlayne on Evidence, Sec. 1454; also Sec. 1449 (at p. 1836),

to effect that such an admission is a proper question for the jury.

> "An unconditional assertion is receivable without any regard to the circumstances which accompany it."
>
> 2 Wigmore on Evidence, Sec. 1061 (at top p. 1230, et seq.).

> "It would follow then, * * * if a plain concession is in fact made, it is receivable, even though it forms part of an offer to compromise."
>
> 2 Wigmore on Evidence, Sec. 1061 (top p. 1232).

> "If therefore the statement is absolute, so far as it appears, it is not saved by any cabalistic phrase (such as 'without prejudice', etc.) nor by its occurrence in the course of compromise negotiations."
>
> 2 Wigmore on Evidence, Sec. 1061 (at bottom p. 1232).

> "Judges, affecting that phrase, seem inclined to give little weight to the general hypothetical nature of discussion attending a compromise—negotiation, and to admit every statement not in itself distinctly conditional."
>
> 2 Wigmore on Evidence, Sec. 1062 (at p. 1239).

We point the fact that there is no reservation or condition attached to the concession or admission as contained in the resolution.

> "But where an offer (to compromise) has been grounded upon an express admission of a fact, and that fact afterwards comes to be controverted between them, there seems to be no ground on which the evidence of the offer can be excluded."
>
> Sanborn v. Neilson, 4 N. H. 501 (at p. 509).

In support of this rule that an admission made without reservation during compromise negotiations is receivable in evidence, we cite:

> Kutcher v. Love, 19 Colo. 542 (at 544); 36 Pac. 152;
>
> Scales v. Shackleford, 64 Ga. 170 (at p. 172),

and the many authorities cited by

> 2 Wigmore on Evidence, Sec. 1062, Note 1.

To the point that this resolution was *some* evidence *tending* to show that it was the sense and understanding of the parties that the services sued

upon were without the scope of the official duties of the defendant in error; also tending to show the relation of the parties and that they understood plaintiff was to be paid, we also cite, in addition to the foregoing authorities:

> McCarthy v. Mt. Tecarte Land & Water Co., 43 Pac. 956.

See also, at page 958, col. 1,

> Barstow v. City R. Co., 42 Cal. 465.

In

> Illinois Central R. R. Co. v. Manion, 101 Am. St. Rep. 345,

the Court says (at p. 347):

> "If it is an independent admission of fact, merely because it is a fact, it will be received, and even an offer of a sum by way of a compromise of a claim *tacitly* admitted is receivable, unless accompanied with a caution that the offer is confidential."

As said by the Court in Snodgrass v. Branch Bank at Decatur, 60 Am. Dec. 505:

> "Proof that plaintiff had made a proposition in writing to the Decatur Bank to compromise his indebtedness * * * was competent as *tending* to show the existence of an indebtedness at that time by the party making the offer."

The same character of evidence is contained in the resolution adopted by and appearing in the minutes of the plaintiff in error under date February 2d, 1905, to wit:

"His (Mr. Dunlap's) management of the *entire* " *business* of the company, *in addition to the affairs* " *of his own office,* * * * and for his * * * " expeditious services in attention to matters con- " nected with securing patent for the company's " mines. During the past year we have had one " serious accident * * * might have resulted in " damage suit against the company * * * but for " the * * * adjustment *effected entirely through* " the good offices of *Mr. Dunlap.*" (Record, p. 29.)

XII.

Assignment of error numbered XII may well be passed without comment, in view of the fact that the instruction referred to WAS GIVEN by the Court in *todidem verbis* (Record, p. 338).

XIII.

The Court did not err in declining to give the instruction demanded by plaintiff in error as set out in assignment numbered XIII. Such an instruction would have been an improper statement of the law, as evidenced by the authorities already cited herein.

XIV.

This assignment of error may also be passed as not correctly stating the law. (Authorities heretofore cited).

XV.

Comment on assignment of error numbered XV is unnecessary, as the instruction referred to WAS

GIVEN *in todidem verbis* by the Court (Record, p. 339).

XVI.

For the same reason as last given we pass assignment of error numbered XVI. It WAS GIVEN, *in todidem verbis* (Record, p. 340).

XVII.

We make no comment upon assignment of error numbered XVII, for the reason that the principles and rules of law applying in connection with this assignment were fully discussed in the argument to assignment of error numbered I, supra.

XVIII.

We here renew our objection supra to any consideration by the Court of assignment of error numbered XVIII, upon the ground as hereinbefore stated, that no proper exception, and *no exception whatever,* was taken, as required by Circuit Court Rule 22, or otherwise or at all, to this instruction by the Court (Record, pp. 345-346).

We submit, however, that the instruction as given was a correct statement of the law.

XIX.

We make the same renewal of our objection supra to the consideration of assignment numbered XIX, viz.: that no proper exception was taken to same as required by Rule 22 Circuit Court and the practice

of the Court. And we further submit that this instruction was correct in law and is uniformly supported by the great weight of authority (cases cited, pp. 8 & 10, this brief).

XX and Subdivision 1 of XXI.

Referring to the question of excessive damages, assigned as error in assignment No. XX and subdivision 1 of number XXI, the only evidence in the case regarding the value of services such as were rendered by defendant in error, at the time he rendered same, is that such services were, at that time, compensated at the rate of from $200 to $800 a month (Record, p. 27). True, Mr. Knox (Record, p. 264, p. 290) testified that he thought Mr. Dunlap's services were of no value and at times detrimental. But the self-serving nature of this evidence is plainly apparent in the light of the resolutions (Record, pp. 28-29 and Record, pp. 293-294) adopted by and appearing in the minutes of plaintiff in error.

The question of the value of the services of defendant in error was one of fact to be determined by the jury. The services, extra-official, extended over a period of seven years, January 15, 1903, to February 15, 1910; the only evidence as to the value of such services is, as stated (Record, p. 75), that they were worth from $200 to $800 a month. At $200 a month for the 85 months the result would be $17,000, at $800 a month $68,000. The defendant in error ceased to draw an agreed or any salary on his resignation as secretary and treasurer on February

21, 1905; from then until February 15, 1910, 60 months, at $200 a month the result would be $12,000, at $800 a month $48,000. Conceding for the purpose of argument that which we deny as a matter of law, viz., that the statute of limitations began to run in this case, as contended by plaintiff in eror, on February 15, 1906, the intervening 48 months to February 15, 1910, would, at $200 a month, result in $9600, at $800 a month $38,400, and at the average, $500 a month, $24,000.

The jury found for defendant in error and fixed the value of the services at $7500. In the light of the facts and the evidence there does not appear to be any passion or prejudice or excessive damages involved in the amount awarded by the jury as the value of the services which it found had been rendered. It was less than any possible computation under the direct evidence. It was a question for the jury. If there be conflicting evidence on the question of the value of these services, the Court will not disturb the jury's verdict, and if there be no evidence to the contrary of the value found, it certainly presents less reason for disturbance.

To the effect that the Court has *no power on writ of error* to consider whether the verdict of the jury was excessive as to damages, we cite:

St. Louis &c. Co. v. Spencer, 36 U. S. App. 229;

New York L. E. & W. R. Co. v. Winter, 143 U. S. 60 (at p. 75).

XXIII.

We here renew our objection to any consideration of alleged error assigned as No. XXIII, upon the ground, as hereinbefore stated, that there was no proper or other exception, and in fact *no exception whatever,* to the instructions referred to in this alleged assignment, either in accordance with Circuit Court Rule 22 or in compliance with general rules of practice. We further object to its consideration upon the ground and for the reason that it does not comply with the spirit of Rule 11 of this Court, in that, as to that portion quoted, viz.: "In segregating un-" official from official services, you will consider all " the testimony in the case," it does not set out the instruction in full, but merely an excerpt, without giving the other portions of the charge to which that excerpt referred and with which it was interwoven (Record, p. 335).

Aside from this objection to its consideration, however, the instruction, as to the portion above quoted, taken as it must be, if considered at all, with the remainder of the charge of which it is a part, as also the excerpt of instruction quoted in the remainder of this so-called assignment, taken as it must be, if considered at all, with the remainder of the charge of which it is a part (Record, p. 336), correctly states all phases of the law applicable, and for the same reasons, and under the same authorities, as given, argued and cited in the comments in this brief, supra, directed to the general issue, as

also the argument specially directed to assignments of error numbered X and XI.

This brief was completed and copy delivered to the printer prior to the service of the brief of plaintiff in error.

An examination of the latter brief discloses that a large portion of it is given over to a so-called "statement of facts",—largely argumentative as to the character of the evidence, the deductions to be drawn and conclusions to be reached from it, and its general materiality and weight; and far beyond the limits set by the rule as to errors *assigned* for the admission or non-admission of evidence.

The major portion of the "argument" in the brief is similarly given over to a discussion of the weight of the evidence and the conclusions to be reached from it, and plaintiff in error fails to confine itself in its brief to the evidence for the admission or rejection of which error has been assigned, or upon which error can here be predicated; and which, we submit, therefore, will not be here considered by the Court as to what it does or does not establish, either as matter of fact or law.

As we understand the practice, the only questions to be considered on writ of error are the exceptions, the admission or rejection of evidence, and the charge of the Court and its refusal to charge.

> "It may be that if we were to *usurp the functions of the jury* and determine the weight to be given the evidence, we might arrive at a

different conclusion. But *that is not our province on a writ of error.* In such a case *we are confined to* the *consideration* of *exceptions,* to the *admission* or *rejection* of *evidence,* and to the *charge of* the *Court and* its *refusal to charge.* We have *no concern with questions of fact or the weight to be given to the evidence* which was properly admitted."

New York L. E. & W. R. Co. v. Winter, 143 U. S. 60 (at p. 75).

With the *Pennsylvania cases* as practically the *only exception,* as we have heretofore in our brief pointed out,—we find on examination of the cases and authorities cited in the brief of the plaintiff in error,—as the Court will find on investigating same,—that they in no wise modify or change the principles laid down on the general issue as established by the cases cited in our brief, and that, in their exceptions to those principles, they are all capable of construction supporting the case at bar and the cases in this brief cited by us.

Indeed most of them support us in our views of the case at bar on various points involved and we take pleasure in citing, among the cases cited by plaintiff in error:

National Loan & Investment Co. v. Rockland, 94 Fed. 339 (at p. 338),

where the Court says:

"But such *officers who have rendered services under an agreement,* either express *or implied,* with the corporation, *its owners or representatives,* that they shall receive reasonable but in-

> definite compensation therefor, *may recover* as much as their services are worth,—*and it is not beyond the power of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices.*"

The foregoing opinion also holds that *whether* there is an *implied agreement with the representative* of the corporation *is for the jury to decide.*

To same effect see:

> Red Bud Realty Co. v. Smith, 131 S. W. 340 (cited by plaintiff in error).

The other authorities cited by plaintiff in error go to the main point that *an officer as such* cannot be voted or paid or sue for and obtain a salary except upon prior express agreement by charter provision, by law or appropriate resolution, which proposition of law is not disputed by us. It was upon this point that the following cases cited by plaintiff in error turned, viz.:

> Wood & Sons Co. v. Schaefer (suit for salary of president, *as such*);
>
> Doe v. N. W. Coal & Trans. Co. (suit for salary of president, *as such*);
>
> Gaul v. Kiel &c. Co. (suit for salary of officer, as such).

The same question is discussed in the other cases cited (except Pennsylvania) by plaintiff in error, and the opinions support the principle that the *service can be recovered for on implied assumpsit where* they are *extra official.*

To the point that the agreement may be made with the *representatives* of the corporation (Mr. Knox, for instance, as the president and general manager), and that the president and general manager has implied power and authority to make same, we cite the following cases cited by plaintiff in error:

> Swedish American Bank v. Kobernick, 117 N. W. 1021 (at top col. 1, p. 1022);
>
> Deal v. Inland Logging Co., 100 Pac. 157,

in which the Court says:

> "Services performed under circumstances" (to raise the presumption) "that it was well *understood by* proper *corporate officers* as well as by himself that the services were to be paid for."

> Doe v. N. W. Coal & Trans. Co., 78 Fed. 62,

in which the Court says:

> "The president and the secretary of a corporation are vested with implied power to execute its negotiable paper."

We ask, then, is not the president and general manager, who "made all contracts" for the company, vested with implied power to agree for the company for payment of the services of an employee?

Latourette v. Weldrum, cited by plaintiff in error, was reversed because a charge was given on an issue not made by the pleadings, and not on incompetent evidence.

Pyper v. Salt Lake Am. Assn., cited by plaintiff in error, was a *case of estoppel* of plaintiff to claim salary for the reason that his *company* when *insolvent conducted a reorganization* scheme for *payment of all its debts,* in which reorganization he participated and was silent as to any debt to him.

The other cases cited by plaintiff in error, including the Pennsylvania cases, are, in so far as they differ from the principle that extra-official service may be recovered for on assumpsit, flatly in contradiction to the decisions of the U. S. Supreme Court and the great weight of current authority.

As to the authority of Mr. Knox, as president and general manager, to employ and agree for payment of such services,—we further cite:

2 Cook on Corp., 6th Ed., Sec. 716 (p. 2277), reading that:

> "His (president's) authority may arise from his having assumed and exercised power in the past."

And Sec. 716 Id. (pp. 2289-90):

> "In all cases the president binds the corporation by his acts and contracts * * * when he has been permitted by the corporation for some time to act and contract for it."

The defendant in error respectfully submits that there are no errors on the face of the record and that none of the questions of law raised by the

plaintiff in error in the record herein, and none of the alleged errors assigned, can be maintained; that the motion for a directed verdict was properly overruled; that the motion for non-suit was properly denied; that the trial Court properly refused to grant the motion of plaintiff in error herein for a new trial, and that the verdict found herein and the judgment herein entered thereon should stand.

Respectfully submitted,

McIntosh & Cooke,
C. H. McIntosh,
H. R. Cooke,
Attorneys for Defendant in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

(IN ADMIRALTY)

No. 2027.

THOMAS S. BURLEY, and ROBERT McCULLOUGH, doing business under the firm name and style of TACOMA TUG & BARGE COMPANY,

Appellants,

vs.

COMPAGNIE DE NAVIGATION FRANCAISE (a Corporation),

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

REPLY BRIEF OF APPELLANTS

JAMES M. ASHTON,
Advocate for Appellants.

410 Fidelity Building, Tacoma, Washington.

The Bell Press, Printers.

REPLY BRIEF OF APPELLANTS

As appellee, in their brief, have not offered a single fact or argument to show that Pilot Burley did not act in good faith and as he honestly believed to be best and his only safe course, we again wish to assert that the decree against appellants under the law cannot, and should not, stand.

There are, however, some parts of appellee's brief which should be referred to; otherwise the same may unintentionally become misleading in the event of This Honorable Court being unable to read, in detail, all testimony in the Apostles. First, at page 26 of appellee's brief, it is stated, in an argumentative manner, that the first mate, Logre, could talk English. Opposing counsel knows as well as the writer that such was not the case, and that the evidence, on account of being transferred pursuant to our stipulation from cause No. 455, does not, in every case, show when an interpreter was and was not used. It is apparent, throughout the entire testimony, that the only member of the "Cecille's" crew who could speak English to any intelligent or useful extent was the captain. Pilot Burley testifies, at page 157 of the Apostles, that this same mate "did not talk any English." Captain Clift's testimony shows, as does that of all others who came in contact with the officers of the ship, that the only one upon board who could make any statement in English was the second mate,

Bourdet, and as to his knowledge, we call the court's attention to the proceedings at page 372, when his counsel was compelled, upon re-direct examination, to extricate the witness from his difficulty as to the dragging of the ship, by showing that he did not understand the questions put to him in English, and which he attempted to answer in English, and he was compelled, by his own counsel, to fall back upon the interpreter, Mr. Roche. Under these conditions, we submit that it is not only unfair for opposing counsel to lead the court to believe that the first mate was familiar with English, but it is equally unfair to throw all the blame of this unfortunate occurrence upon a well-meaning pilot, who was struggling to do his best under all circumstances, when the ship, as a matter of fact, was not properly manned, having no one on board her who, in an English-speaking port, could communicate in English upon matters of the most vital importance, and which they knew must necessarily be talked about in English before they could be carried out by the pilot.

If we have stated in our brief that the third mate was ashore when the towage occurred, it should be that he was ashore when the collision occurred, and the captain was ashore when both occurred. Surely it was not necessary for the captain to leave his ship all the afternoon of the 9th, and apparently all day on the 10th, and until after the collision, solely to sign bills of lading, if such, in fact, was what he was doing. It is further strange that Captain Annette has not accounted for his absence, and that no reasons are

given in the record for leaving the ship's command in this condition — a condition which served to greatly intensify the extraordinary difficulties under which Pilot Burley was laboring by reason of the fog.

Counsel further seeks to avoid the fault of the ship in running out too much chain, whether by reason of defective appliances or not, by quoting from the Apostles to show that they hauled in the chain to 75 fathoms by reason of Pilot Burley's orders, and, while we know that counsel would not intentionally mislead the court, yet their quotation at page 25 of appellee's brief, stopping, as it does, just short of the evidence which clinches the statement in appellants' brief in this regard, might have the effect of so misleading. If the court will kindly turn to page 237 of the Apostles, it will be noted that the very next question and answer after the words which counsel has italicized are as follows:

"Q. Heave up so as to leave four shackles out?

"A. Yes."

And, further down, on the same page:

"Q. What was your understanding when you left there as to whether or not it would be heaved up to four shackles or otherwise?

"A. It was my understanding that when they got steam they would heave up, which I have no doubt they did."

The court will readily see that, in order to place this matter fairly, the testimony which we have just quoted should be considered, and it is clear from all the testi-

mony that Burley's aim and intention was to expressly limit the anchor cable to four shackles, which is not 75 fathoms, but 60 fathoms; and a difference of 15 fathoms, or 90 feet, which in the swing of a ship in a place of the kind in question makes all the difference in the world, and it is clearly enough to have avoided the collision had the pilot's order been carried out, and it is perfectly clear from the evidence that anything greater than 60 fathoms, or four shackles, would have endangered the ship going ashore against the mud flats to the eastward and southward, as well as endangering the swinging of her dangerously near the fairway.

We respectfully submit that the argument of counsel and testimony but partially quoted at pages 29 and 30 of appellee's brief are specious in the extreme, for the purpose of showing that the ship could have been safely moved before the collision on the following day. If the witnesses, Coffin, Walker and Barlow, there quoted were willing to testify that appellants could have safely or prudently gone out and attempted the moving of the ship during the short and but partial lifting of the fog, why were they not so asked, and why have they not given their testimony? Anyone can construct a probable theory because someone could see a certain distance that the thing so seen could be moved, but not a soul has been called by appellee from the waterfront of Tacoma or elsewhere to show that it was prudent or safe for appellants to undertake the moving of the ship on the following day. We therefore respectfully re-assert that the evidence of the man in authority, the harbor-master,

Captain Mountford, quoted in our brief, should not be overthrown by reason of any probable theory as to other witnesses who merely observed the ship in a casual manner, which was the case with Walker, or for the purpose of navigating about her, which was the case with the witnesses Captains Coffin and Barlow. We again respectfully submit that Pilot Burley and his partner, the appellants, should not be subjected to such severe punishment as the payment of this large sum of money will impose upon them for having honestly and faithfully done what they believed to be best and the only safe course under the circumstances? To do so will discourage rather than encourage the best efforts of pilots, and change the existing law as to their responsibility when acting without negligence, and in good faith.

JAMES M. ASHTON,
Advocate for Appellants.

No. 2030

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MONTANA TONOPAH MINING COMPANY (a corporation),
Plaintiff in Error,

vs.

R. P. DUNLAP,
Defendant in Error.

Upon Writ of Error to the Circuit Court of the United States, for the District of Nevada.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.

Filed this ..... day of June, 1912.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2030

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MONTANA TONOPAH MINING COMPANY (a corporation),
Plaintiff in Error,

vs.

R. P. DUNLAP,
Defendant in Error.

Upon Writ of Error to the Circuit Court of the United States, for the District of Nevada.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the plaintiff in error and respectfully petitions this honorable court to grant it a rehearing upon the errors assigned upon the record herein and to withdraw and annul the opinion heretofore, and on the 6th day of May, A. D. 1912, filed herein,

affirming the judgment of the court below, and as grounds and reasons for said petition the plaintiff in error saith:

First. This honorable court erred in its statement, and therefore in its understanding, where in said opinion it is said:

> "There was some testimony to support plaintiff's claim that he had rendered services for the company beyond the scope of the duties of the offices which he held."

Second. This honorable court erred in its statement in said opinion wherein it is said:

> "The portions of the resolution of February 15th, 1910, so admitted in evidence were in line with the resolution of the same board adopted February 2nd, 1905, to the introduction of which no objection was made."

for the reason that the resolution of February 2nd, 1905, especially recites that the Directors of the corporation

> "* * * *are especially pleased and gratified that Mr. Dunlap remains on the Board of Directors, where we may continue to enjoy the benefits of his wise counsel,* which has been a material factor always and has contributed in such a marked manner to the success of the company."

Third. That this honorable court, while in its opinion going in detail into the evidence adduced at the trial, has ignored the fact, as plaintiff in error contends, that there was no evidence whatever

that the services rendered by defendant in error were outside the scope of his official duties.

Fourth. That the burden of proof was at all times upon the defendant in error to show that the services, compensation for which he sues to recover, were entirely outside the scope of his official duties, and defendant in error has failed to submit evidence to that effect.

Fifth. That the evidence adduced at the trial showed there were no by-laws of the corporation during the greater part of the period defendant in error was an officer and during which he alleges to have rendered services, suit for the value of which is brought, and that there was no contract, resolution of the corporation, or other evidence submitted, excepting the custom and usage of officers and directors occupying identical positions with defendant in error in similar corporations at the same time and place, by which the jury could determine whether or not the services alleged to have been rendered were within, or without, the scope of defendant in error's official duties.

Sixth. That this honorable court erred in its opinion that the admission of any portion of the resolution of the Board of Directors of defendant company adopted February 15, 1910, was competent for any purpose.

Seventh. The opinion of this honorable court, affirming the judgment of the court below, is in

other respects erroneous to the great injury and detriment of plaintiff in error.

Plaintiff in error, therefore, prays this honorable court to grant a rehearing of the issues presented by the errors in this cause.

Dated, San Francisco,
June 5, 1912.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.

Argument.

The court has patiently reviewed in great detail nearly all of the evidence of plaintiff as to what services he rendered for and on behalf of the defendant corporation and the circumstances under which the plaintiff claims to have rendered such services, but in so doing it appears to the defendant that the crucial facts which entitle the plaintiff to a recovery for such an extraordinary amount and under such unusual circumstances may have been overlooked and the importance of the principle herein involved which may permit unscrupulous directors to prey unrestrainedly upon the assets of their corporations warrants us to again direct the attention of the court to the law and facts herein presented.

The court in its opinion states that what plaintiff claims and gave testimony tending to support was that the services, for the value of which he sues, bore certain characteristics as follows:

(a) Such services were beyond the scope of his duties as Secretary and Treasurer, Director, or Vice-President.

(b) Such services were neither volunteered nor gratuitous, but were rendered at the express request of the President and Manager of the company, and

(c) That both plaintiff and the company expected that they were to be paid for.

From January 24, 1903, to September, 1903, plaintiff was merely Secretary and Treasurer of the defendant corporation; from September, 1903, to February 15, 1910, he was a Director of the company and continued at the same time his office of Secretary and Treasurer to February 2, 1905; from September 11, 1906, to February 15, 1910, he was a Vice-President of the company, as well as a Director, and upon the last mentioned date by resignation he relinquished both of his offices as a Director and Vice-President; so that from September, 1903, eight months after his connection with the company began, until eleven days prior to the beginning of this action, he was at all times a Director of the company.

It must be admitted that certain duties fell upon him by virtue of his office of Secretary and Treasurer, and it must also be assumed that the offices of Director and Vice-President of the corporation carried with them certain other obligations and duties, and to entitle the plaintiff to recover at the hands of the jury two facts of equal importance must have been made to appear clearly to the jury regarding the services, compensation for which he seeks to recover, to wit:

(a) They must be such as are clearly outside of his duties as an officer and director, and

(b) They must have been intended not to be gratuitous.

While it may be admitted the plaintiff's testimony tended to show that he did not intend the services to be gratuitous, a careful review and search of all of the evidence in the case fails to show a scintilla of evidence to the effect that the services were outside the duties of the respective offices which plaintiff from time to time held. We assume that it is not important in this action whether or not the services were requested by the President and General Manager of the company, inasmuch as if such requested services were within the scope of plaintiff's duties he could not on that account recover, and if they were shown to be without his duties he could recover whether or not requested.

Defendant most urgently maintains, however, that there must have been furnished to the jury some standard or measure by which they could determine the character of the services rendered and the relation of such services to the official duties of plaintiff. There should have been shown some standard or measure by which they could determine whether or not the services rendered by the plaintiff coincided with the duties of his offices. The burden of proof under the pleadings lay upon the plaintiff to provide such standard or measure, and this he most glaringly failed to do. Permitting the case to go to the jury without proof of this character created error as fatal as to permit the jury to pass upon any other fact in issue, concerning which no evidence has been submitted, and the far-

reaching consequences of allowing a jury to determine without evidence what are the duties of any officer of a corporation cannot be over-estimated. If the plaintiff's services were clearly without the scope of his official duties, such fact should have been made to appear. The services related by the plaintiff may have been meritorious and useful to the corporation, but so far as the evidence submitted by the plaintiff is concerned, no one can ascertain whether such services should be considered official, or extra-official. To determine this fact resort might have been had to the statutes of the state where the corporation was domiciled, to its charter, to any minutes showing a resolution of employment, or a contract of the corporation, and, these failing, the custom prevailing in similar corporations in the same community and at the same time should have been shown to enable the jury to find any fact as to the character of the services.

The line should have been clear cut and decisive, for this matter lies at the fonudation of plaintiff's right to recover. Was there evidence of any kind submitted by the plaintiff tending to show whether the services, which are the subject of this action, were official or non-official? May we leave a jury without evidence, to assume as to facts of any character? Could the jury in any way determine, directly or inferentially, what services of plaintiff were official or non-official without proof of some character upon this point? So far as we have been able to ascertain none of the cases cited in the

opinion of the court have turned upon this question of burden of proof. In the Fitzgerald case, 137 U. S. 96, the plaintiff's salary as General Manager had been fixed on a certain date and his services had been of the same nature before and after that date. In the Toponce case, 152 U. S. 405, the testimony was that the plaintiff had been "the General Manager of the company's business". In Railroad Company v. Tiernan, (Kan. Sup.) 15 Pac. 544, the question decided was the same as that of Rasborough v. Canal Company, 22 Cal. 557, and other cases, that the Board of Directors had a right to fix the salary of the President of a corporation after the services were rendered, it having been understood that the President was to be compensated, but in none of the cases which we have examined has it been disclosed that the plaintiff is relieved from the obligation of showing whether his services were within or without his official duties, and the only manner in which that could be done was to place in the possession of the jury accurate knowledge as to what his official duties were. In such a case the jury would be able to determine the character of the services. We find no precedent for the belief that a jury, or a court, may decide such an important *fact* without proof, or that a jury, or a court, may take judicial notice of what are the official duties of any officer or director of any particular corporation. Such duties vary greatly in different corporations and they may be entirely those assigned to the plaintiff by a resolution of the board.

There is no proof, nor attempted proof, in the case under consideration whether the isolated services claimed to have been rendered by the plaintiff were such as he would naturally be expected to render, or be required to render, during his occupancy of the various offices which he from time to time filled. They are merely certain isolated services and were allowed to go to the jury who were permitted to infer without evidence as to whether or not the plaintiff should have performed them as his official duties. In the case of Brown v. Republican Mountain Silver Mines (Colo.), 30 Pac. 66, the court states:

> "But even if the more liberal rule may be resorted to in some cases, it certainly should be held that a director cannot recover compensation for services rendered by himself to a corporation upon an implied contract, unless it be established by a clear preponderance of the evidence—First, *that the services were clearly outside his ordinary duties as a director,* and, Second, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers, as well as himself, that the services were to be paid for."

In the case of Dial v. Inland Logging Company (Wash.), 100 Pac. 157, the court held:

> "A trustee or officer cannot recover, unless it be established by a clear preponderance of the evidence *that the services were clearly outside of his ordinary duties.*"

And, also, in Henry v. Michigan Sanitarium and Benevolent Association (Mich.), 100 N. W. 523:

> "A trustee of a corporation who claims compensation for services *must prove not only that the services fell outside of the scope of his regular duties,* but also that they were performed under circumstances sufficient to show that payment was understood."

In the Territorial Court of Utah, before its removal to the federal court, where the question was not raised, it was held in Toponce v. The Corinne Mill, Canal and Stock Company, 24 Pac. 534:

> "It must be shown by a preponderance of the evidence *that his services were clearly outside his duties as an officer.*"

While it is true in this case that no evidence was submitted by the plaintiff in regard to the fact as to whether his services were official, or extra-official, and there was no evidence upon which the jury should have been instructed, or could have found that the services were extra-official, yet there is full and complete evidence in the testimony of Mr. Lynch and Mr. Knox that the services testified to by the plaintiff were identical with those rendered by like officers of other corporations operating at the same time and in the same community. On page 227 of the transcript, Mr. Lynch, giving his reasons for believing that the services testified to by the plaintiff were entirely within the scope of his official duties, states:

"In all my time in Tonopah I have been connected with corporations, several, and I have performed just these same duties, patenting claims, settling accidents, discharging all that line of duties, and I never received a cent for that, nor never expected to for years. That is the reason, in my judgment, I do not think they are of value. * * *

"Q. Now, I understand you testify, Mr. Lynch, that, basing your knowledge of the course and management of mining corporations at Tonopah and in that vicinity, that in your opinion services for which Mr. Dunlap is seeking to recover in this action were without value?

"A. Yes, outside of his scope, outside of the duties that were required of him."

On pages 302 and 303 of the transcript Mr. Knox testified that he knew what duties were usually and customarily performed by Secretaries and Treasurers of corporations operating in the Tonopah Mining District in the State of Nevada during the period within which the plaintiff was the Secretary and Treasurer of this corporation, and on page 303 in effect that the services so rendered were identical with those claimed to have been rendered by the plaintiff and the introduction of this testimony by Mr. Knox of custom was most strenuously resisted. All of the testimony, both of Mr. Knox and Mr. Lynch, as to custom stands uncontradicted in any manner, and in the absence of any other proof, either by plaintiff or defendant, as to whether or not the services claimed to have been rendered by the plaintiff were such as may be denominated offi-

cial, or non-official, the testimony of these two gentlemen must control.

Eager v. Atlas Insurance Company, 14 Pickering 141;

Adams v. Pittsburg Insurance Company, 76 Pa. St. 411.

The question, therefore, to be determined with reference to the above is whether or not as a matter of law a jury may determine what services rendered by an officer or a director of a corporation are within the scope of his official duties when there is no evidence as to what his official duties are, and whether or not without evidence a court, or a jury, may take judicial notice of what constitutes the scope of the duties of directors and officers of corporations.

The court in its opinion has referred to two certain resolutions, the whole of the first and a portion of the second of which were admitted in evidence at the trial. The first resolution was adopted at a meeting of the Board of Directors of the defendant company on February 2, 1905, upon the occasion of plaintiff tendering his resignation as Secretary and Treasurer of defendant company. It will be borne in mind that at the time this resignation was tendered and until the 15th day of February, 1910, plaintiff was a Director of the defendant. The other resolution, a portion of which only was admitted in evidence, was adopted at a meeting of the Board of Directors practically five years subsequent

to the first and upon the occasion of plaintiff making his demand upon the corporation for compensation. It is the contention of the defendant that the court has not correctly read the two resolutions, otherwise it could not have arrived at the conclusion expressed in the opinion that the latter resolution was in line with the former. The former resolution recites that plaintiff's resignation is accepted with sincere regret and generally commending plaintiff for the zealous interest he has taken in the company's affairs, complimenting him upon the able and efficient performance of his duties and congratulating the corporation upon the fact that the plaintiff remains on the Board of Directors

> "where we may continue to enjoy the benefits of his wise counsel, which has been such a material factor always and has contributed in such a marked manner to the success of the company".

This resolution, while considered immaterial to the issues, was admitted without objection by the defendant. It cannot be conceived that the adoption of this resolution at the acceptance of plaintiff's resignation could possibly be construed as the acknowledgment of an obligation on the part of the company to pay any further compensation for the services which plaintiff had then rendered. The resolution does not state that the board is pleased and gratified that the plaintiff remains with them where they may continue to enjoy the benefits of his counsel at a fixed salary, or compensation, and

it was only natural that if compensation at that time had been contemplated some reference would have been made to it in the resolution.

The admission in evidence of the resolution adopted at the meeting of the board held on February 15, 1910, however, was made over defendant's objection.

We do not see in what respect the resolutions are similar, the latter resolution having been adopted as a compromise for the purpose of settling a large claim for the amount of One Thousand Dollars by a board different in its personnel from that serving at the time the services were rendered and upon a date more than seven years subsequent to the time when the claim began to run, and could not be construed in any manner as binding the corporation beyond the amount set forth in the offer contained in the resolution if such offer had been accepted at that time.

The plaintiff must recover by the strength of his own case. If he had rendered no services he surely could not recover by virtue of the resolution of February 15, 1910, unless he had accepted the proposition therein contained and proved its acceptance. Further than this, it was not competent as an admission by the corporation, either that the services were outside the scope of plaintiff's official duties, or that he was entitled to compensation therefor, for the reason that it was too remote in point of time and made only by individual directors who had

no power to bind the corporation itself to perform an ultra vires or an unlawful act. The situation would have been entirely different if there had been recognition made while the services were being rendered that such services were outside the scope of plaintiff's official duties, but as a matter of fact the recognition was not so made and was made only for the purpose of a compromise, as appears upon its face.

We respectfully submit that few petitions for rehearing of cases in this honorable court have as their ground a principle so important or a stronger basis both in law and of fact than this one.

All of which is respectfully submitted.

Dated, San Francisco,
June 5, 1912.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition for rehearing is not interposed for delay.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.

See briefs in 2031

No. 2034

United States
Circuit Court of Appeals

For the Ninth Circuit.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the First Collection District of California,

Plaintiff in Error,

vs.

GEORGE D. BLISS, Jr., Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2034

United States
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For the Ninth Circuit.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the First Collection District of California,

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FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Names and Addresses of Attorneys.

ROBERT T. DEVLIN, Esq., United States Attorney, for the Northern District of California,

Attorney for Defendant and Plaintiff in Error, Room 317 U. S. P. O. & Courthouse Bldg., San Francisco, California.

MARSHALL B. WOODWORTH and EDWARD LANDE, Esqs.,

Attorneys for Plaintiff and Defendant in Error, 519 California St., San Francisco, California.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

GEORGE D. BLISS, Jr., Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of the Internal Revenue of the United States, for the 1st Collection District of California,

Defendant.

Complaint.

The plaintiff above named complains of the defendant and respectfully states as follows:

I.

That on February 22, 1902, George D. Bliss died, being at the time of his death and for a long time previous thereto a resident of the City and County

of San Francisco, State and Northern District of California, leaving a last will and testament which was thereafter duly admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, on or about March 1, 1902.

II.

That George D. Bliss, Jr., was duly named and appointed executor of said last will and testament of said deceased.

III.

That on or about March 15th, 1902, letters testamentary upon said will were duly issued and granted to the said George D. Bliss, Jr., by the said Superior Court of the State of California, [1*] in and for the city and County of San Francisco, and said George D. Bliss, Jr., thereupon duly qualified and entered upon his duties and thereafter remained such executor and now is the duly appointed, qualified and acting executor of said estate.

IV.

That the defendant, August E. Muenter, is now, and has been since the 1st day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenues of the United States, for the 1st Collection District of California, having his official place of residence in the City and County of San Francisco, State and Northern District of California.

V.

That previous to said 1st day of October, 1907,

*Page number appearing at foot of page of original certified Record.

when said defendant, August E. Muenter, became the duly appointed, qualified and acting Collector of Internal Revenues as aforesaid, John C. Lynch was and had been during all of the time in this complaint alleged up to the 1st day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States, for the 1st Collection District of California, having his official place of residence in the City and County of San Francisco, State and Northern District of California, and was succeeded on said 1st day of October, 1907, as Collector of Internal Revenues, by the defendant, August E. Muenter as aforesaid.

VI.

That the residuary personal property left by said testator by the terms of the said will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenues as aforesaid, for the purpose of the Federal succession tax (which estimate is for the purpose of this action acquiesced in by the [2] plaintiff) amounted in value as follows, to wit:

The share of the estate left to Annie Bliss Rucker, a daughter of the said George D. Bliss, deceased, the sum of $14,872.26;

The share of the estate left to Helen M. Sullivan, the sum of $14,872.26;

The share of the estate left to George D. Bliss, Jr., a son of the said George D. Bliss, deceased, the sum of $51,702.885;

The share of the estate left to Richard O. Bliss, the sum of $51,702.885;

The share of the estate left to Harriet L. Herr-

mann, another daughter of the said George D. Bliss, deceased, the sum of $14,872.26.

VII.

That on the 3d day of February, 1904, the said John C. Lynch, assuming to act as said Collector of Internal Revenue as aforesaid, and under the Act of Congress commonly known as the "War Revenue Law" of June 13, 1898 (also known as the "Federal succession tax), did by force and duress exact, demand and collect from said executor of said last will and testament of said George D. Bliss, deceased, the sum of One Thousand Four Hundred and Ninety-seven and Ninety-four One Hundredths ($1,497.94) Dollars, claiming the same to be a lawful assessment under said Act on account of the legacies above set forth.

That said tax of $1,497.94 was imposed and assessed by said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, as follows:

On the sum of $14,872.26, the same being the share of the estate left to Annie Bliss Rucker, a daughter of the testator George D. Bliss, deceased, the tax of $111.54, being at the rate of 75 cents for every hundred dollars of said sum of $14,872.26; [3] on the further sum of $14,872.26, the same being the share of the estate left to George D. Bliss, Jr., a son of said testator George D. Bliss, deceased, the tax of $581.66, being at the rate of $1.12½ cents for every hundred dollars of said sum of $51,702.885; on the further sum of $51,702.885, the same being the share of the estate left to Richard O. Bliss the tax of $581.66, being at the rate of $1.12½ for every hun-

dred dollars of said sum of $51,702.885; on the further sum of $14,872.26, the same being the share of the estate left to Harriet L. Herrmann, a daughter of said testator George D. Bliss, deceased, the tax of $111.54, being at the rate of 75 cents for every hundred dollars of said sum of $14,872.26; on the further sum of $14,872.26; the same being the share of the estate left to Helen M. Sullivan the tax of $111.54, being at the rate of 75 cents for every hundred dollars of said sum of $14,872.26.

VIII.

That said sum of $1,497.94 was paid from the funds and property of said estate by said executor of said last will and testament of George D. Bliss, deceased, as aforesaid, involuntarily and under protest and protesting that they were not, nor was the estate represented by said executor, nor were said legacies or said legatees hereinabove named, or any of them, liable to pay said tax, or any part thereof.

IX.

That each and every of the shares of said estate left to said legatees above named were paid to said persons and each of them on or about May 1st, 1903, by order of the Superior Court of the State of California, in and for the City and County of San Francisco.

X.

That thereafter and on February 2, 1906, said George D. [4] Bliss, Jr., as executor of said last will and testament of George D. Bliss, deceased, duly filed with said John C. Lynch, the then Collector of Internal Revenue, for the 1st Collection District of

California, a claim for the refunding of said tax of $1,497.94, so collected as aforesaid, and appealed to the Commissioner of Internal Revenue, from the action of said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, in holding said executor of the last will and testament of said George D. Bliss, deceased, and the estate represented by such executor and the legacies and the legatees above mentioned, and each of them, liable to the payment of said legacy tax of $1,497.94, and in collecting the said legacy tax in the manner aforesaid, and represented to the said Commissioner that the collection of said tax was unlawful and that the amount thereof should be refunded for the following reasons, among others;

That the said George D. Bliss died in the city and County of San Francisco, State of California, on February 22, 1902, and under the United States Statutes as they then stood, no war revenue tax became due or payable for one year after death; that said law was repealed and said repeal became effective July 1, 1902; that under the decisions of Capp vs. Mason, 94 U. S. 589, Mason vs. Sargent, 104 U. S. 689, Eideman, Collector of Internal Revenue, etc., vs. Tilgman et al., executors, etc., 136 Fed. Rep. 141, the legacy internal revenue tax imposed and collected by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, was and is illegal and erroneous and without authority of law, and should be refunded.

XI.

That more than six months have expired since the

taking of said appeal to said Commissioner for the refunding of said tax, and said Commissioner has neither allowed nor disallowed said claim. [5]

XII.

That no part of said tax of $1,497.94, has been refunded or repaid to said plaintiff as such executor, or to the estate represented by him, or to said legatees above mentioned, or to any of them, or to any other person, or at all, and that the said sum of $1,497.94 is still due, owing and unpaid.

Wherefore, plaintiff demands judgment against the defendant for the said sum of One Thousand Four Hundred and Ninety-seven and 94/100 (1,497.94) Dollars, with interest and costs of this action.

EDWARD LANDE and
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Marshall B. Woodworth, being duly sworn, deposes and says: That he is the attorney for the said plaintiff herein named, and duly authorized to act for them in all matters pertaining to this suit; that said plaintiff resides out of the City and County of San Francisco, State of California, and in the County of Alameda, California; that said affiant is as familiar with the facts in said complaint stated as said plaintiff is; that he has read the within complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and be-

lief, *as* as to those matters, he believes them to be true.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me this 8″ day of June, A. D. 1908.

[Seal] THOMAS S. BURNES,
Notary Public, in and for the City and County of San Francisco, State of California. [6]

[Endorsed]: Filed June 10, 1908. Southard Hoffman, Clerk. By W. B. Maling, Dep. Clk. [7]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

GEORGE D. BLISS, Jr., Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of the Internal Revenue of the United States, for the 1st Collection District of California,

Defendant.

Summons.

Action brought in the said Circuit Court and the complaint filed in the office of the Clerk of the said

Circuit Court, in the City and County of San Francisco.

EDWARD LANDE,
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.

The President of the United States of America, Greeting: To August E. Muenter, Collector of the Internal Revenue of the United States, for the 1st Collection District of California, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the Complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 10th day of June, in the year of our Lord one thousand nine hundred and eight and of our Independence the 132d.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk. [8]

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within Summons on the 10th day of June, 1908, and personally served the same on the 10th day of June, 1908, upon August E. Muenter, Collector of the Internal Revenue of the United States for the 1st Collection District of California, the defendant therein named, by delivering to and leaving with P. J. Haskins, Chief Deputy of August E. Muenter, Internal Revenue Collector, said defendant named therein, personally at *the* San Francisco County of San Francisco in said District, a copy thereof, together with a copy of the Complaint, attached thereto.

C. T. ELLIOTT,
U. S. Marshal.
By Paul J. Arnerich,
Deputy.

Dated at San Francisco this 10th day of June, 1908.

[Endorsed]: Filed June 11, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [9]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,730.

GEORGE D. BLISS, Jr., Executor, etc.,

vs.

AUGUST E. MUENTER, Collector, etc.

Demurrer.

Comes now the defendant in the above-entitled ac-

tion and demurs to the complaint of plaintiff on the ground:

1.

That the same does not state facts sufficient to constitute a cause of action against this defendant.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant.

I hereby certify the foregoing demurrer is not interposed for the purpose of delay, but is interposed in good faith, and that, in my opinion, the same is well founded in point of law.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant.

Service of the within Demurrer by copy admitted this —— day of June, 1908.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff.

[Endorsed]: Filed June 13, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy. [10]

At a stated term, to wit, the July Term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday the 3d day of August in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,730.

GEORGE D. BLISS, Jr., Excr., etc.,

vs.

AUGUST E. MUENTER, Col., etc.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein came on this day to be heard and by consent of George Clark, Esq., Assistant United States Attorney, it is ordered that said demurrer be and the same is hereby overruled with leave to the defendant to answer herein within forty-five days. **[11]**

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

GEORGE D. BLISS, Jr., Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of the Internal Revenue of the United States, for the 1st Collection District of California.

Defendant.

Answer.

Comes now the defendant and answering plaintiff's complaint on file herein admits, denies and alleges, as follows:

I.

Admits the allegations of paragraph I of plaintiff's complaint.

II.

Admits the allegations of paragraph II of plaintiff's complaint.

III.

As to the allegations of paragraph III to the effect that the plaintiff at the time of the commencement of this action was the executor duly appointed, qualified and acting of the last will of George D. Bliss, deceased, defendant alleges that he has no information or belief sufficient to enable him to answer the said allegation, and placing his denial on that ground, he denies that the plaintiff was such executor, either appointed, or qualified or acting.

IV.

Admits the allegations of paragraph IV of plaintiff's complaint. [12]

V.

Admits the allegations of paragraph V of plaintiff's complaint.

VI.

Admits the allegations of paragraph VI of plaintiff's complaint.

VII.

Admits the estate of the said George D. Bliss, deceased, paid the legacy tax on One Thousand Four Hundred Ninety-seven and 94/100 (1497.94) Dollars imposed and assessed as set forth in paragraph VII of said complaint upon the legacies of personal property mentioned and described in said paragraph VII and in said paragraph VI of the plaintiff's complaint. Defendant denies that he collected the said taxes or any portion thereof by force or duress, or

by force or duress. Defendant alleges that the taxes were voluntarily paid and that there was no force, actual or threatened, and no duress of any kind exercised by defendant in exacting, demanding or collecting the said tax.

VIII.

Defendant denies that the said taxes were or that any portion thereof was paid under protest, either oral or in writing or under any claim of any kind specifying that the said taxes were unlawful and that there was no liability to pay the same, or under any other claim of illegality whatever.

IX.

As to the allegations of the said complaint to the effect that plaintiff is the owner of the alleged cause of action set forth in plaintiff's complaint, defendant alleges that he has no information or belief sufficient to enable him to answer the said allegations, and placing his answer upon that ground, he denies that the plaintiff owns or has any interest in [13] the alleged cause of action set forth in plaintiff's complaint.

X.

Admits the allegations of paragraph X of plaintiff's complaint.

XI.

Admits the allegations of paragraph XI of plaintiff's complaint.

XII.

Admits that no part of the said taxes paid as herein admitted or alleged has ever been repaid by the defendant, or the United States of America.

Wherefore defendant prays that plaintiff take nothing by this action, and for costs of suit.

ROBERT T. DEVLIN,
United States Attorney,
Attorney for Defendant. [14]

State and Northern District of California,
City and County of San Francisco,—ss.

August E. Muenter, being first duly sworn, deposes and says:

That he is the Collector of the Internal Revenue of the United States for the First Collection District of California, and the defendant herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true except as to the matters which are therein stated on information and belief, and that as to those matters, he believes it to be true.

AUG. E. MUENTER.

Subscribed and sworn to before me this 9th day of October, 1908.

[Seal] W. B. MALING,
Deputy Clerk U. S. Circuit Court, Northern District of California.

Service of the within Answer by copy admitted this —— day of Oct., 1908.

MARSHALL B. WOODWORTH, L
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy. [15]

At a stated term, to wit: the November term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Friday, the 9th day of December, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,730.

GEORGE D. BLISS, Jr., Exr., etc.,

vs.

AUGUST E. MUENTER, etc.

Order Directing Findings to be Filed and Judgment to be Entered.

This cause having been heretofore submitted to the Court for consideration and decision, and the same being now fully considered, it was ordered that findings be filed and judgment entered herein in favor of the plaintiff for the sum of $113.68 with interest thereon and for costs. [16]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,730.

GEORGE D. BLISS, Jr., Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue of the United States, for the 1st Collection District of California.

Defendant.

Findings of Fact and Conclusions of Law.

This cause having been tried by the Court without a jury, a jury having been waived in writing, the Court, after due consideration, makes the following Findings of Fact and Conclusions of Law:

I.

That the plaintiff, George D. Bliss, Jr., was at all of the times in the complaint alleged, and now is, the duly appointed, qualified and acting executor of the last will and testament of George D. Bliss, deceased;

II.

That at all of the times in said complaint alleged, Annie Bliss Rucker, Helen M. Sullivan, Harriet L. Herrmann, George D. Bliss, Jr., and Richard O. Bliss were the children and heirs at law of said George D. Bliss, deceased, and the beneficiaries under the terms of his last will and testament;

III.

That John C. Lynch was the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California, at all of the times mentioned in said [17] complaint, and up to October 1, 1907, at and from which time, August E. Muenter became the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California, and ever since has been, and now is, such Collector of Internal Revenue, and was duly and regularly substituted as party defendant in the place and stead of John C. Lynch;

IV.

That George D. Bliss died on or about February 2, 1902, in the City and County of San Francisco, State of California, being a resident thereof at the time of his death and leaving property therein, and leaving a last will and testament, which was thereafter admitted to probate in accordance with the proceedings taken under the laws of the State of California, on or about March 1, 1902.

V.

That, according to the terms of said last will and testament, George D. Bliss, Jr., was duly named and appointed executor of said last will and testament of George D. Bliss, deceased.

VI.

That on or about March 1, 1902, the said Superior Court duly made and entered its order admitting said last will and testament to probate and appointed said George D. Bliss, Jr., executor thereof, who

thereafter duly qualified and continued to act as executor of said estate and now is the duly appointed, qualified and acting executor of the last will and testament of said George D. Bliss, deceased.

VII.

That the residuary personal property left by said testator by the terms of his will, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid amounted in [18] value as follows, to wit:

The share of the estate left to Annie Bliss Rucker, a daughter of said George D. Bliss, deceased, the sum of $14,872.26;

The share of the estate left to Helen M. Sullivan, a daughter of the said George D. Bliss, deceased, the sum of $14,872.26;

The share of the estate left to George D. Bliss, Jr., a son of the said George D. Bliss, deceased, the sum of $51,702.88;

The share of the estate left to Richard O. Bliss, a son of the said George D. Bliss, deceased, the sum of $51,702.88;

The share of the estate left to Harriet L. Herrmann, a daughter of the said George D. Bliss, deceased, the sum of $14,872.26.

VIII.

That on February 3, 1904, said John C. Lynch, the then Collector of Internal Revenue for the First Collection District of California, acting under and by virtue of the provisions of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901, and the rules and regulations of

the United States Internal Revenue Department in such cases made and provided, assessed said George D. Bliss, Jr., as executor of the last will and testament of George D. Bliss, deceased, an internal revenue tax, aggregating the sum of $1,497.94, said tax being assessed upon the legacies distributed under and by virtue of the terms of said last will and testament of said George D. Bliss, deceased, to the above-named beneficiaries, as follows:

Upon the legacy tax of $14,872.26 in favor of Annie Bliss Rucker, the tax of $111.54; upon the legacy of $14,872.26, in favor of Helen M. Sullivan, the tax of $111.54; upon the legacy of $51,702.88, in favor of George D. Bliss, Jr., the tax of **[19]** $581.66; upon the legacy of $51,702.88, in favor of Richard O. Bliss, the tax of $581.66; upon the legacy of $14,872.26, in favor of Harriet L. Herrmann, the tax of $111.54; said legacy taxes aggregating the sum total as above stated of $1,497.94.

IX.

That on February 3, 1904, said George D. Bliss, Jr., as executor of the last will and testament of said George D. Bliss, deceased, paid to the then Collector of Internal Revenue for the First Collection District of California, the sum of $1497.94, which sum was paid by the said George D. Bliss, Jr., as executor as aforesaid, for and on behalf of the beneficiaries above named.

X.

That said assessment and payment of said tax as aforesaid was made under protest.

XI.

That under and by virtue of the terms of the last will and testament of the said George D. Bliss, deceased, the share of the estate bequeathed and distributed by said will to Annie Bliss Rucker, was a direct gift *in praesenti* and vested absolutely in possession and enjoyment at the time of the death of said George D. Bliss, deceased, except as to a reversionary interest in ten shares of the stock of the Farmers Ditch Company, which, accordnig to the terms of said last will and testament (hereby being made a part hereof), could not vest absolutely in possession or enjoyment in favor of said Annie Bliss Rucker during the lifetime of her mother, the wife and widow of said George D. Bliss, deceased.

XII.

That under and by virtue of the terms of the last will and testament of the said George D. Bliss, deceased, the share [20] of the estate bequeathed and distributed by said will to Helen M. Sullivan was a direct gift *in praesenti* and vested absolutely in possession and enjoyment at the time of the death of said George D. Bliss, deceased, except as to a reversionary interest in ten shares of the stock of the Farmers Ditch Company, which, according to the terms of said last will and testament (hereby being made a part hereof), could not vest absolutely in possession or enjoyment in favor of said Helen M. Sullivan during the lifetime of her mother, the wife and widow of said George D. Bliss, deceased.

XIII.

That under and by virtue of the terms of the last

will and testament of said George D. Bliss, deceased, the share of the estate bequeathed and distributed by said will to George D. Bliss, Jr., was a direct gift *in praesenti* and vested absolutely in possession and enjoyment at the time of the death of said George D. Bliss, deceased.

XIV.

That under and by virtue of the terms of the last will and testament of said George D. Bliss, deceased, the share of the estate bequeathed and distributed by said will to Richard O. Bliss was to be held in trust, and was held in trust, until said Richard O. Bliss should attain the age of twenty-five years.

XV.

That said Richard O. Bliss attained the age of twenty-five years previous to the repeal of the Act of June 13, 1898, as amended by the Act of Congress of March 2, 1901, which said repeal took effect on July 1, 1902, and that thereupon and previous to the repeal of the law of July 1, 1902, the share of the estate bequeathed and distributed to him became vested absolutely in possession and enjoyment. [21]

XVI.

That under and by virtue of the terms of the last will and testament of the said George D. Bliss, deceased, the share of the estate bequeathed and distributed by said will to Harriet L. Herrman was to be held in trust, and is now held in trust so long as said Harriet L. Herrmann shall remain the wife of ——— Herrmann (reference being hereby made to said will attached hereto); and that said

share of said estate so bequeathed and distributed by said will to Harriet L. Herrmann has not vested absolutely in her possession or enjoyment and has never been distributed to her, but at the time of the repeal of the law, to wit, on July 1, 1902, was then being held in trust as provided for by the terms of said last will and testament and as herein stated, and is now being held in trust for and on behalf of said Harriet L. Herrmann.

XVII.

That at all of the times mentioned in said complaint the said Harriet L. Hermann has remained the wife of said Herrmann, and now is, and continues to be, the wife of said Herrmann.

XVIII.

That the income derived from the share of the estate bequeathed and distributed by said last will and testament to Harriet L. Herrmann, of the value above set out, to be held in trust as aforesaid did not at any time previous to the repeal of the law on July 1, 1902, amount to the sum of $10,000 a year or at all.

XIX.

That in and by the terms of the last will and testament of the said George D. Bliss, deceased, said Harriet L. Herrmann was bequeathed a reversionary interest in ten shares of *of* the stock of the Farmers Ditch Company, which, according to the terms of **[22]** said last will and testament (hereby being made a part hereof), could not vest absolutely in possession or enjoyment in favor of said Harriet L. Herrmann, during the lifetime of her mother, the

wife and widow of said George D. Bliss, deceased.

XX.

That the legacy tax on said ten shares of Farmers Ditch Company, as computed, by said John C. Lynch, the then Collector of Internal Revenue, upon the clear or actual value of the reversionary interest, aggregated the sum of $2.14, which tax was assessed against the reversionary interests of said Annie Bliss Rucker, Helen M. Sullivan and Harriet L. Herrmann, in said ten shares of stock of the Farmers Ditch Company, and which tax was paid by said George D. Bliss, Jr., as executor of the last will and testament of George D. Bliss, deceased.

XXI.

That the said John C. Lynch, the then Collector of Internal Revenue and said Commissioner of Internal Revenue, and said August E. Muenter, the present defendant and successor in office of said John C. Lynch, have at all times refused to refund said sum of $1,497.94, or any part thereof.

From which foregoing Findings of Fact, I deduce and make and enter the following Conclusions of Law:

I.

That George D. Bliss, Jr., is the proper party plaintiff and has the legal capacity to institute and maintain this action;

II.

That the personal property and legacies distributed, under the terms of the last will and testament of George D. Bliss, deceased to Annie Bliss Rucker, except as to her reversionary interest in the ten

shares of the stock of the Farmers Ditch Company; to Helen M. Sullivan, except as to her reversionary **[23]** interest in the ten shares of the stock of the Farmers Ditch Company; to George D. Bliss, Jr., and to Richard O. Bliss, were, and each of them was, vested beneficial interests, which vested absolutely in possession and enjoyment in said above-named beneficiaries prior to July 1, 1902, that being the date of the repeal of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901; and that the plaintiff is not entitled to recover said legacy taxes, or any portion thereof, assessed and paid upon the legacies and distributive shares of the beneficiaries named in this particular paragraph.

III.

That the personal property and legacy distributed under the terms of the last will and testament of George D. Bliss, deceased, to be held in trust, and now being held in trust, for the benefit of Harriet L. Herrmann was, and now is, a contingent beneficial interest, which did not vest absolutely in possession or enjoyment within the meaning of the Act of Congress of June 27, 1902, prior to the repeal of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901, which repeal took effect on July 1, 1902.

IV.

That said taxes, assessed, imposed and collected as aforesaid upon the reversionary interests of said Annie Bliss Rucker, Helen M. Sullivan and Harriet L. Herrmann, in and to ten shares of the stock of

the Farmers Ditch Company was illegal and erroneous, inasmuch as said reversionary interests were contingent beneficial interests which did not vest absolutely in possession or enjoyment within the meaning of the Act of June 27, 1902, prior to the repeal of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901, which said repeal took effect on July 1, 1902. **[24]**

V.

That said taxes specified in the two preceding paragraphs so assessed, imposed and pa*ye*d as herein before set out in the Findings of Facts and in the two preceding Conclusions of Law, were, and each of them is, illegal and erroneous, and each of them was erroneously and illegally assessed, imposed and collected without authority of law.

VI.

That the plaintiff recover judgment against the defendant, as Collector of Internal Revenue for the First Collection District of California, in the sums of $111.54, and $2.14, being the amount of taxes assessed, imposed and pa*ye*d as aforesaid upon the legacy in favor of Harriet L. Herrmann and the reversionary interests in said ten shares of the stock of the Farmers Ditch Company, in favor of Annie Bliss Rucker, Helen M. Sullivan and Harriet L. Herrmann, with interest on said sums at the rate of seven per cent per annum from February 3, 1904, the same being the date when said taxes were paid to the then Collector of Internal Revenue, and with

interest from date of said judgment and costs of suit as taxed.

WM. C. VAN FLEET,
Judge.

Jan'y. 18th, 1911.

Approved.

GEO. CLARK,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14,730.

GEORGE D. BLISS, Jr., Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of the Internal Revenue of the United States, for the 1st Collection District of California,

Defendant.

Judgment on Findings.

This cause having come on regularly for trial upon the 8th day of December, 1910, being a day in the November, 1910, Term of said Court, before the Court, sitting without a jury, a trial by jury having been duly waived by stipulation filed, Marshall B. Woodworth, Esq., having appeared as attorney for

plaintiff, and George Clark, Esq., Assistant United States Attorney, having appeared as attorney for the defendant, and the trial having been proceeded with upon the 8th and 9th days of December in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and the evidence having been closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith and for costs:

Now therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that George D. Bliss, Jr., executor of the last will and testament of George D. Bliss, deceased, plaintiff, do have and recover of and from [26] August E. Muenter, as Collector of Internal Revenue, for the First District of California, defendant, the sum of One Hundred Sixty-nine and 05/100 ($169.05) Dollars together with his costs in this behalf expended taxed at $——.

Judgment entered January 18, 1911.

SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

A true copy, Attest:
[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[27]

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 14,730.

GEO. D. BLISS, Jr., etc.,

vs.

AUGUST E. MUENTER, etc.

Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 18th day of January, 1911.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[28]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,730.

GEORGE D. BLISS, Jr.,

Plaintiff,

vs.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the 1st Collection District of California,

Defendant.

Petition for Writ of Error.

August E. Muenter, the defendant in the above-entitled action, feeling himself aggrieved by the judgment of the above-entitled court, entered upon the 18th day of January, 1911, whereby it was adjudged that the plaintiff have and recover from the defendant the sum of $113.68/100, with interest on the same, now comes by Robert T. Devlin, Esq., his attorney, and petitions said court for an order allowing him, the said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the said

United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioner will ever pray, etc.

Dated July 7th, 1911.

AUGUST E. MUENTER,
Collector as Aforesaid,
By ROBT. T. DEVLIN,
His Attorney.

[Endorsed]: Filed Jul. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,730.

GEORGE D. BLISS, Jr.,
Plaintiff,

vs.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the 1st Collection District of California,
Defendant.

Assignment of Errors.

Now comes August E. Muenter, as Collector of the Internal Revenue of the United States for the 1st Collection District of California, the defendant in the above-entitled action, by Robt. T. Devlin, Esq., his attorney, and specifies the following as the errors upon which he will rely and which he will urge upon his writ of error in the above-entitled action, to wit:

I.

The Court erred in refusing to make defendant's proposed finding number 1, which is in the words and figures following, to wit:

"1. That the Court upon the evidence introduced, oral and documentary, find that the legacies or the distributive shares of property upon the passing of which the amount of taxes in question in this case was levied or assessed, vested in immediate possession or enjoyment upon the death of the deceased by virtue of the death of the deceased and the will of the deceased whose estate is referred to in the complaint."

II.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 1. [30]

III.

The Court erred in refusing to make defendant's proposed finding number 2, which is in the words and figures following, to wit:

"2. That such legacies or distributive shares of property upon which the Collector of Internal Revenue levied or assessed the amount of taxes in question were not in any respect contingent legacies or shares."

IV.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 2.

V.

The Court erred in refusing to make defendant's

proposed finding number 3, which is in the words and figures following, to wit:

"3. That neither the possession nor the enjoyment of any of the legacies or distributive shares of property on account of which the amount of taxes in question was levied or assessed was contingent upon any matter whatsoever."

VI.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 3.

VII.

The Court *Court* erred in refusing to make defendant's proposed finding number 4, which is in the words and figures following, to wit:

"4. That each of the legacies and distributive shares mentioned in the complaint on account of the passing of which the amount of taxes in question was levied or assessed and paid vested in immediate possession and enjoyment."

VIII.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 4. [31]

IX.

The Court erred in refusing to make defendant's proposed finding number 5, which is in the words and figures following, to wit:

"5. That each legacy or interest taxed was capable of a clear valuation."

X.

The Court erred in finding the facts to be directly

contrary to the matters set forth in the said defendant's proposed finding number 5.

XI.

The Court erred in refusing to make defendant's proposed finding number 6, which is in the words and figures following, to wit:

"6. That the said clear valuations were correctly ascertained in levying or assessing of the tax."

XII.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 6.

XIII.

The Court erred in refusing to make defendant's proposed finding number 7, which is in the words and figures following, to wit:

"7. That in no case referred to in the complaint was any tax levied or assessed on any legacy or interest in property except upon the clear value thereof so correctly ascertained and that the amount of taxes collected was computed and determined in accordance with such clear valuation;"

XIV.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 7. [32]

XV.

The Court erred in refusing to make defendant's proposed finding number 8, which is in the words and figures following, to wit:

"8. That the relationships sustained to the deceased by the persons named in the complaint to

whom the legacies or interests therein mentioned passed were ascertained by the Collector and properly considered in computing the tax."

XVI.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 8.

XVII.

The Court erred in refusing to make defendant's proposed finding number 9, which is in the words and figures following, to wit:

"That the amount of taxes mentioned in the complaint was levied and assessed only in accordance with the clear value of the property on which the same was computed and in accordance with the relationship of the legatee, the passing of whose legacy interest was in fact taxed."

XVIII.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 9.

XIX.

The Court erred in finding and determining in this case that plaintiffs were the owners of the claim and demand in suit.

XX.

The Court erred in finding and deciding that the plaintiffs had presented to the Collector of Internal Revenue any claim for a refunding of the taxes in question. [33]

XXI.

The Court erred in finding and determining that

the plaintiffs and claimants did appeal to the Commissioner of Internal Revenue at Washington, District of Columbia, following the presentation of, or any ruling upon the presentation of any claim to the Collector of Internal Revenue at San Francisco, California, such claim being for the refunding of the taxes in suit.

XXII.

The Court erred in ruling that the Collector of Internal Revenue at San Francisco, California, caused a tax to be levied or assessed by reason of a legacy or legacies described in the will of the deceased person mentioned in the complaint; the Court has found that such legacies were contingent and did not vest in possession or enjoyment at the time and particularly prior to the repeal on July 13th, 1902, of the War Revenue Act under which the taxes were imposed; the finding and conclusion of the Court so made in favor of the plaintiffs was based upon the terms of the will of the deceased which left the legacy on account of which the tax was levied or assessed in trust for a certain period of time, at the end of which period the trust was to terminate and possession of the property had by the legatee; the defendant specifies that notwithstanding the possession of the legacies was postponed within the meaning of the statute, the legacy did pass in possession and enjoyment and particularly did pass in enjoyment, and that the legatee was given a vested beneficial interest in the property and that the tax in question was levied upon only such interest in the property as was given to the legatee; a present valuation was fixed

upon the property in view of the fact that the enjoyment and use of the corpus of the trust fund was postponed and the defendant [34] assegns as error the ruling of the Court that a clear valuation could not be fixed upon the quantity of interest which did in fact pass to the legatee whose interest was taxed.

XXIII.

The defendant also specifies that it appears from the terms of the will that the legacy so taxed, although the same passed in trust, was an interest which was the subject of sale and was capable of a clear valuation, and that clear valuation was in fact ascertained by the Collector of Internal Revenue in levying the tax.

XXIV.

The defendant also specifies that even though such legacy was not the subject of sale, nevertheless, the same was capable of a clear valuation which was in fact ascertained by the Collector of Internal Revenue in fixing the tax.

XXV.

The Court erred in finding that the clear valuation of the property which was left by legacy to Harriet L. Herrmann was the value of the property which was left in trust to her; the value of the property which was taxed on account of its having been left to said Harriet L. Herrmann was ascertained with due consideration to the fact that the actual possession of the same was postponed as shown by the Findings and by the will of the deceased.

XXVI.

The Court erred in making that part of Finding

XI after the word "Except," which said Finding XI is as follows:

"That under and by virtue of the terms of the last will and testament of the said George D. Bliss, deceased, the share of the estate bequeathed and distributed by said will to Annie Bliss Rucker was a direct gift *in praesenti* and vested absolutely in possession and enjoyment at the time of the death of said George D. Bliss, deceased, except as to a reversionary interest in ten shares of the stock of the Farmers Ditch Company, which, [35] according to the terms of said last will and testament (hereby being made a part hereof) could not vest absolutely in possession or enjoyment in favor of said Annie Bliss Rucker during the lifetime of her mother, the wife and widow of said George D. Bliss, deceased."

XXVII.

The Court erred in finding and concluding that the tax levied or assessed was excessive.

XXVIII.

The Court erred in finding or concluding that the amount of taxes in question was levied or assessed as to any property upon interests which, under the will of the deceased, could not vest in possession or enjoyment.

XXIX.

The Court erred in finding or concluding that the reversionary interest in the ten shares of stock of the Farmers Ditch Company which are mentioned in Finding XI was a contingent interest and did not pass in enjoyment or possession to the legatee to whom the same was left.

XXX.

The Court erred in finding or concluding that the tax in question was erroneously or improperly assessed upon the passing of the said interest in said ten shares of stock and in finding and concluding that such passing was contingent.

XXXI.

The Court erred in making Finding No. 18, as follows:

"That the income derived from the share of the estate bequeathed and distributed by said last will and testament to Harriet L. Herrmann, of the value above set out, to be held in trust as aforesaid did not at any time previous to the repeal of the law on July 1, 1902, amount to the sum of $10,000 a year or at all."

XXXII.

The Court erred in finding that the clear value of the property left by legacy to Harriet L. Herrmann did not amount to the sum of $10,000, previous to the repeal of the War Revenue [36] Act on July 1st, 1902.

XXXIII.

The Court erred in finding that the amount of the tax levied or assessed upon the interest of the said Harriet L. Herrmann was not levied or assessed upon any vested interest.

XXXIV.

The Court erred in concluding that the plaintiff was entitled to judgment for the two following named sums, $11.54 and $2.14, together with interest upon said sums.

XXXV.

The Court erred in rendering judgment in favor of the plaintiff for said sums last mentioned.

XXXVI.

The Court erred in rendering judgment in favor of the plaintiff in any sum whatsoever. [37]

Specifications of the Insufficiency of the Evidence to Sustain the Findings.

The evidence was insufficient to sustain the finding of the Court in each case and in the case of each legacy involved in each case;

1: That the legacy did not pass in immediate possession or enjoyment;

2: That the legacy on account of the passing of which the tax was levied or assessed was a contingent beneficial interest;

3: That the legacy on account of the passing of which the tax in question was levied or assessed was not a vested legacy and did not vest prior to July 1st, 1902;

4: That the enjoyment or possession of the legacy was dependent upon and contingent upon some uncertain event;

5: That the possession or enjoyment of the legacy was contingent upon any event whatsoever;

6: That the clear value of the legacy on account of the passing of which the tax in question was levied or assessed was fixed by the Collector as the same as the clear value of the property compromised within such legacy;

7: That the legacy on account of which the tax was levied or assessed was not a legacy capable of

any clear valuation by the Collector of Internal Revenue, taking into consideration the fact that the property passed into the trust and the physical possession thereof was to be held by the trustees for a certain period;

8: That the clear valuation of the legacy was not correctly ascertained or fixed by the Collector of Internal Revenue; [38]

9: *The* the clear valuation of the legacy on account of the passing of which the tax was levied or assessed as fixed by the Collector of Internal Revenue was excessive.

Dated July 10, 1911.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Jul. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,730.

GEORGE D. BLISS, Jr., Executor, etc.,

Plaintiff,

vs.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the 1st Collection District of California,

Defendant.

Order Allowing Writ of Error.

Upon motion of Robert T. Devlin, Esq., United States Attorney for the Northern District of California, attorney for the defendant in the above-entitled cause, and upon filing the petition for a writ of error and assignment of errors herein.

IT IS HEREBY ORDERED that a writ of error be, and it is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the judgment heretofore rendered herein, and other matters and things in said petition and assignment set forth.

Dated July 10th, 1911.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jul. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14,730.

GEORGE D. BLISS, Jr., Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of the Internal Revenue of the United States, for the 1st Collection District of California,

Defendant.

Clerk's Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing forty (40) pages, numbered from 1 to 40, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Circuit Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the transcript of record on writ of error in this cause amounts to the sum of $21.40; that said sum will be charged by me in my quarterly account against the United States, for the quarter ending September 30, 1911, and that the original writ of

error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 31st day of August, A. D. 1911.

[Seal] SOUTHARD HOFFMAN,

Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[41]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between August E. Muenter, Collector of the Internal Revenue of the United States, for the 1st Collection District of California, plaintiff in error, and George D. Bliss, Jr., executor of the last will and testament of George D. Bliss, deceased, defendant in error, a manifest error hath happened to the great damage of the said August E. Muenter, Collector of the Internal Revenue of the United States, for the 1st Collection District of California, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 9th day of August, 1911, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 10th day of July, in the year of our Lord One Thousand Nine Hundred and Eleven.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by

WM. C. VAN FLEET,

Judge.

Service of within Writ and receipt of a copy thereof is hereby admitted this 11th day of July, 1911, without waiving any rights with reference to the Bill of Exceptions not having been settled and signed within the last term, or proper or any assignments of

error having been served and filed.

MARSHALL B. WOODWORTH,
Attorney for Defendants in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: No. 14,730. Circuit Court of the United States, Ninth Circuit, Northern District of California. August E. Muenter, etc., Plaintiff in Error, vs. George D. Bliss, Jr., Defendant in Error. Writ of Error. Filed July 11th, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

[Citation (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to George D. Bliss, Jr., Executor of the Last Will and Testament of George D. Bliss, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals,

for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 9th day of August, 1911, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States, for the Northern District of California wherein August E. Muenter, Collector of the Internal Revenue of the United States, for the 1st Collection District of California is the plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this Tenth day of July, A. D. 1911.

WM. C. VAN FLEET,
United States District Judge.

Service of within Citation, by copy, admitted this 11th day of July, A. D. 1911 without waiving any rights with reference to the Bill of Exceptions not having been settled and signed within the last term, or proper or any assignments of error having been settled and filed.

MARSHALL B. WOODWORTH,
Attorney for Defendant in Error.

[Endorsed]: No. 14,730. In the Circuit Court of the United States, for the Ninth Circuit, Northern

District of California. August E. Muenter vs. George D. Bliss, Jr. Citation. Filed July 11th, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [43]

[Endorsed]: No. 2034. United States Circuit Court of Appeals for the Ninth Circuit. August E. Muenter, as Collector of the Internal Revenue of the United States for the First Collection District of California, Plaintiff in Error, vs. George D. Bliss, Jr., Executor of the Last Will and Testament of George D. Bliss, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filed August 31, 1911.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AUGUST E. MUENTER, etc.,

Plaintiff in Error,

vs.

GEORGE D. BLISS, Jr., Executor, etc.,

Defendant in Error.

Order Extending Time to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including September 6, 1911, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 7, 1911.

WM. C. VAN FLEET,

United States District Judge, Northern District of California.

[Endorsed]: No. 2034. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16, Section 1, Enlarging Time within which to File Record thereof and to Docket Case to and Inclg. Sept. 6, 1911. Filed Aug. 7, 1911. F. D. Monckton, Clerk. Refiled Aug. 31, 1911. F. D. Monckton, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, as collector of Internal Revenue of the United States for the First Collection District.
Plaintiff in Error.

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of George D. Bliss, deceased,
Defendant in Error.

No. 2034.

BRIEF OF DEFENDANT IN ERROR ON REHEARING

MARSHALL B. WOODWORTH,
Attorney for Defendant in Error.

EDWARD LANDE,
Of Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, as collector of Internal Revenue of the United States for the First Collection District. *Plaintiff in Error.* **vs.** GEORGE D. BLISS, as Executor of the Last Will and Testament of George D. Bliss, deceased, *Defendant in Error.*	No. 2034.

BRIEF OF DEFENDANT IN ERROR ON REHEARING

A re-hearing was granted by this Honorable Court on November 1, 1912.

Counsel for plaintiff in error contended, on page 2 of his Petition for Re-hearing:

I.

"That there is an interest passing to the said Harriet L. Herrmann which can be definitely ascertained.

II.

The value being ascertainable, the Court should make a final disposition of the case upon the record in favor of plaintiff in error."

We respectfully maintain that neither contention is tenable.

This Honorable Court, in its opinion rendered April 1, 1912, in the above entitled case and four companion cases (consolidated for the purposes of trial and appeal) said: "In the fourth suit, Muenter v. Bliss, personal property was left to certain trustees to be held in trust for the benefit of one Harriet L. Herrmann so long as she should remain the wife of the man who was then her husband, the income in the meantime to be paid to her. At the time of the levy of the tax in question, and at the time of the trial in the court below, she was still the wife of Herrmann." * * *

In holding that the legacies left in trust, in the above entitled case, were contingent, beneficial interests which had not vested previous to the repeal of the War Revenue Act, which repeal took effect July 1, 1902, this Honorable Court said:

"The question presented in the court below was whether the personal property and legacies left under the terms of the respective wills to the trustees, in trust for the respective beneficiaries, were contingent beneficial interests, or whether the property in each case vested absolutely in possession or enjoyment, and thereby became subject to the tax within the meaning of Act Cong. June 13, 1898, 30 Stat. 448, as

amended by Act March 2, 1901, 31 Stat. 946, and supplemented by Act June 27, 1902, 32 Stat. 406, and as affected by Act April 12, 1902, c. 500, 32 Stat. 96 (U. S. Comp St. Supp. 1911, p. 978), repealing the former acts, the repeal to take effect on July 1, 1902.

In each case the legacies had been assessed for the gross amount thereof and the taxes had been paid under protest, and in each case the action had been brought by the respective defendants in error to recover the amount so paid on the ground that the tax had been unlawfully imposed and collected. The court below held that the legacies were contingent beneficiary interests and not vested, and rendered judgments for the defendants in error on the authority of Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, and the decision of this court in Lynch v. Union Trust Co., 164 Fed. 161, 90 C. C. A. 147, and other cases. The legacies having been assessed in gross and upon the theory that the interests were vested, the decision in Vanderbilt v. Eidman was deemed applicable. But in the recent case of United States v. Fidelity Trust Co., 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed.——, decided December 4, 1911, it was held that a legacy of property in trust to a trustee who was to pay the net income to the legatee in periodical payments during the latter's life is not a contingent interest, but a vested estate for life, and that it was assessable under the War Revenue Act of June 13, 1898, upon its value as ascertained with the aid of mortuary tables. On principle we think there can be no distinction between the estate of the beneficiary of*such income of a legacy for life* and that of the beneficiary of such income for a *term of years,* and on the authority of the decision last cited we must hold that in the case of Muenter v. Union Trust Co., and the case of Muenter v. Rosen-

feld, the rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, *but upon the value of the rights to receive the annual income as determined in United States v. Fidelity Trust Co., supra.* * * *

In the case of Muenter v. Bliss, in which the income was to be paid to Harriet L. Herrmann as long as she remained the wife of her husband, the estate in the income is too uncertain to admit of measurement in value."

In the view of this Honorable Court, that "the income is too uncertain to admit of measurement in value," we respectfully acquiesce.

How long Mrs. Harriet L. Herrmann will remain the wife of George Herrmann is impossible to foretell or estimate. The contingency is most uncertain and depends not only on the life of Mrs. Herrmann but also upon the duration of life of Mr. Herrmann; or, again, the relationship might be terminated by divorce. In other words, the relationship of husband and wife can be terminated in any one of three ways; (1) by the death of the husband; (2) by the death of the wife; (3) by divorce. Which will it be in the case at bar? Who can foretell? Upon what basis shall the right to the income be predicated? Upon the life of the husband? Or, upon the life

of the wife? The difficulties in the way of a fair and just computation are not imaginary or fanciful, but real.

Aside from these uncertainties to admit of measurement in value, the vested right in the income to be derived from a legacy of $14,872.26, left in trust to Mrs. Herrman, ascertained with the aid of the mortuary tables promulgated by the Commissioner of Internal Revenue, is too small to be the subject of any legacy tax at all. In other words, the vested right to the income *during the life* of Mrs. Herrmann did not amount to the sum of $10,000.00 and, therefore, was not subject to a legacy tax under the War Revenue Act of June 13, 1898. This will be made clearer by the computation which will be illustrated later on.

In this case, the defendant in error sued to recover $1, 497.94, claimed to have been taxes unlawfully and erroneously collected by the Collector of Internal Revenue upon devises and bequests made by the deceased, George D. Bliss, in favor of his several children, including his daughter Harriet who had married and, at the time of his death, was the wife of George L. Herrmann. (See Complaint, Transcript of Record, p. 7).

At the trial, the defendant in error only recovered the two small sums of $2.14 and $111.54, aggregating $113.68, which, with accrued interest allowed by law, totalled $169.05, the amount of the judgment recovered in this case. (See Transcript of Record, pp. 26-28).

As to the sum of $2.14 there cannot be the slightest objection and the judgment must be affirmed as to that sum. The record shows that $2.14 represented the legacy tax unlawfully and erroneously imposed by the Collector of Internal Revenue upon ten shares of stock in the Farmers' Ditch Company, which the deceased devised to his wife during her lifetime, and upon her death said ten shares to be divided equally among three daughters, one of them being Mrs. Harriet L. Herrmann. (See evidence contained in the Transcript of Record in case in this court No. 2031 containing the consolidated bill of exceptions pp. 122, 123, 124, 125, 126, 132, 133; See also Legacy Return and Schedule made to the Collector of Internal Revenue, marked Plaintiff's Exhibit 1.)

It must be obvious that the ten shares could not become vested in the three daughters until the death of the mother, which did not take place prior to the repeal of the War Revenue Act on July 1, 1902, and

that said beneficial interests in said ten shares were therefore contingent and not vested interests at the time of the repeal of the law.

Furthermore, it must be equally obvious that the vested right to an income from the ten shares could never amount to the sum of $10,000.00 so as to be subject to a legacy tax. The Transcript of Record, at page 123 of the record in case No. 2031 (containing the consolidated bill of exceptions) shows that the amount was $142.86 to each of the daughters. (See also Legacy Return and Schedule made to the Collector of Internal Revenue, marked Plaintiff's Exhibit 1.)

We next take up the other item of legacy tax recovered by the defendant in error, to-wit, the sum of $111.54, the same being the tax assessed and collected by the Collector of Internal Revenue upon the legacy of $14,872.26 left in trust for Mrs. Harriet L. Herrmann so long as she should continue to remain the wife of George Herrmann.

It is to be observed, parenthetically and by way of explanation, that all the evidence, oral and documentary, in the case at bar will be found printed in the "Consolidated Bill of Exceptions," in the Transcript of Record in case No. 2031—a companion case to the case at bar, and that this was done to save the Govern-

ment expense in appealing five separate cases, of which the case at bar is one. Outside of the evidence, all of the pleadings and other proceedings peculiar to the case at bar will be found printed in the Transcript of Record in this case (No. 2034).

It is proper to observe that certain original exhibits introduced as evidence in the case at bar, and mentioned on page 133 of the Transcript of Record in Case No. 2031, were not printed in the "Consolidated Bill of Exceptions," in order to save expense to the Government, and that these original exhibits have been transmitted to the Clerk of this Court as part of the record in the case.

By his will, George D. Bliss devised and bequeathed to his son-in-law, Jeremiah F. Sullivan, certain personal property in trust, on the following terms, viz:

"1. To hold the same in trust for my daughter, Harriet L. Herrmann, so long as she continues to be the wife of said George Herrmann.

2. To manage, control and operate the same during the existence of this trust.

3. To pay over to my said daughter annually, the rents, issues, profits and income thereof, after deducting the expenses of managing, controlling and operating the same.

Said trust shall terminate whenever by said daughter ceases to be the wife of said George Herrmann.

If my said daughter shall cease to be the wife of said George Herrmann before her death, then, and in that event, the property embraced in said trust, shall vest in fee simple absolute to my daughter, Harriet L. Herrmann. In case my said daughter dies while she is the wife of said George Herrmann, then, and in that event, the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike."

The value of the legacy thus left in trust for the benefit of Harriet L. Herrmann was assessed by the Collector of Internal Revenue at the clear value of $14,872.26, and, as previously stated, a legacy tax of $111.54 thereon was assessed, imposed and collected.

The corpus of the legacy, to-wit: the sum of $14,-872.26, of course, never vested prior to the repeal of the War Revenue Act on July 1, 1902, and had not vested when suit was brought or before judgment was recovered. Mrs. Harriet L. Herrmann cannot acquire this legacy of $14,872.26 "so long as she continues to be the wife of George Herrmann." So far as the record discloses, she is still the wife of George Herrmann.

Counsel for the plaintiff in error does not find fault with that portion of the opinion of this court, filed April 1, 1912, holding that the legacy of $14,-872.26 had not vested previous to the repeal of the

War Revenue Act and therefore came within the provisions of the Refunding Act of June 27, 1902, (32 Stat. L. 406).

But counsel does contend that the vested right to the income to be derived from $14,872.26 is subject to a legacy tax.

It is to be observed that the Collector of Internal Revenue never made an attempt to assess or impose any legacy tax on such vested right to the income, for the simple reason that such income, computed according to the official mortuary tables adopted by the Commissioner of Internal Revenue, *would not amount to the sum of $10,000.*

In order to be subject to a legacy tax, the legacy or the income therefrom must amount to the sum of $10,000.00.

Act of June 13, 1898, 30 Stat. 448, as amended by Act March 2, 1901, 31 Stat. 946.

The evidence shows conclusively that the income never amounted to the sum of $10,000.00. Finding of Fact XVIII sets forth: "That the income derived from the share of the estate bequeathed and distributed by said last will and testament to Harriet L. Herrmann, of the value above set out, to be held in trust as aforesaid did not at any time previous to the repeal of the law on July 1, 1902, amount to the

sum of $10,000.00 a year or at all." (Transcript of Record, p. 23.)

It is to be observed that according to the provisions of the trust, Jeremiah F. Sullivan was: "(3) To pay over to my said daughter annually, the rents, issues, profits and income thereof, after deducting the expenses of managing, controlling and operating the same."

Assuming that phase of the case most favorable to the contention of plaintiff in error, to-wit: that the legatee, Harriet L. Herrmann, had a vested interest in what was equivalent to a *life estate* to the income to be derived from a legacy of $14,872.26, and computing such income according to the mortuary tables adopted by the Commissioner of Internal Revenue, in compliance with the terms of the decision of the Supreme Court of the United States in the case of United States vs. Fidelity Trust Co. 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed.——, which decision was followed by this court in its opinion rendered April 1, 1912, and we find that even according to this generous method of compution the income would not amount to $10,000.00 or to a sum greater than $9,487.04, which latter sum, of course, is not subject to a tax.

The mortuary tables adopted and promulgated by the Commissioner of Internal Revenue will be found printed on the back of the "Legacy Return," being Government blanks prepared for the purpose of ascer-

taining, assessing and collecting taxes on legacies or the income to be derived therefrom. The "Schedules" and "Legacy Return" prepared and filed with the Collector of Internal Revenue in the estate of George D. Bliss were introduced in evidence and marked "Plaintiff's Exhibit 1." (See page 133 of Transcript of Record in case No. 2031.)

We also refer to the same mortuary tables officially announced in the "Compilation of Decisions rendered by the Commissioner of Internal Revenue" at pages 195 to 199 thereof. This is an official publication and this court will undoubtedly take judicial notice thereof. It contains the identical mortuary tables found printed on the back of the "Legacy Return" and marked "Plaintiff's Exhibit 1."

An important factor in arriving at the present worth (that is, by present worth is meant previous to the repeal of the law on July 1, 1902) of a life interest in a legacy is the age of the legatee.

The age of Mrs. Harriet L. Herrmann, at the time of the death of her father in February, 1902, was *36* years. (See ages set out in the "Legacy Return"—Plaintiff's Exhibit 1)

Computation.

Given a life interest in $14,872.26 to a person *36 years of age.*

To Find

The present worth according to the United States Mortuary tables.

Present worth of an annuity of $1.00 at 36 years	$15.94755
Annuity on legacy of $14,872.26 at 4% interest	$594.89
Present worth of the annuity of $594.89 at 36 years	$9,487.04

As the sum of $9,487.04 does not amount to the sum of $10,000.00, it is, of course, not subject to a legacy tax.

This court, on consulting the mortuary tables printed on the back of the "Legacy Return" (Plaintiff's Exhibit 1), can easily verify the above calculation of the present worth of an annuity or life interest in the sum of $14,872.26 left to a person 36 years of age.

The calculation can be paraphrased almost in the language of "Example 2" contained on the back of the "Legacy Return" (Plaintiff's Exhibit 1.) as follows: A person dying bequeaths to his daughter, age 36 years, a life interest in personal property amounting to $14,872.26.

At a net interest of four per cent per annum, the assumed rate, the estate of $14,872.26 would realize an income or annuity of $594.89. The present value of the sum of $1.00, payable at the end of each year during the life of a person aged 36 years, is found by the table (see table printed on back of "Legacy Return"—Plaintiff's Exhibit 1.) to be $15.-94755, and the present value of an annuity of $594.89 for the same time would be Five hundred and ninety-four and eighty-nine one hundredths times as much, or $9,487.04, the amount upon which the tax accrued.

This arithmetical showing furnishes a complete answer to any and all contentions made by the plaintiff in error.

Under any theory that counsel can advance, the income does not amount to the sum of $10,000.00, and therefore cannot be subject to a legacy tax. We have given him the benefit of all doubts and have assumed, gratuitously, as we believe, that the income to be derived from a legacy of $14,872.26 held in trust for a person 36 years of age was akin or might be likened to the income to be derived from a similar sum held in trust *for the life* of a person 36 years of age. And yet, even under this generous concession on our part, we find that the amount of income, computed according to the official mortuary tables, does not amount to

the sum of $10,000.00 or to a sum greater than $9,-487.04.

This effectually disposes of Plaintiff in Error's contentions.

However, before closing, we cannot refrain from alluding to certain statements made by counsel for the Government as to the applicability of certain sections of the Revised Statutes, notably sections 3226, 3227 and 3228.

He concedes that the present action is brought under section 3 of the Act of June 27, 1902, 32 Stats. L. 406 (see page 5 of Petition for Re-hearing on behalf of Plaintiff in Error.)

The Attorney General of the United States has had occasion to construe this section and has distinctly held that the provisions of this section are special and apply to a particular class of obligations against the Government, and, being special, that claims to refund legacy taxes are not governed nor subject to the provisions of section 3226, 3227, 3228, or any other section, of the Revised Statutes.

The learned Attorney General further held that suits for the recovery of money due under the "Refunding Act" of June 27, 1902, *are not actions for the recovery of taxes,* but for money held by the Government *in trust for the benefit of the parties to whom it rightfully belongs.*

See Opinions of Attorney General, Vol. 26, p. 194, *197*, *198*.

After referring to the facts submitted by the Commissioner of Internal Revenue to the Attorney General for his opinion (which facts are similar to those involved in the case at bar) and setting out section 3 of the Act of Congress of June 27, 1902, (under which section the suit in the case at bar was brought and recovery had in the court below), the learned Attorney General said:

"It can not be held that claims arising under this act are barred, because of the failure of the claimants to present them for allowance within two years from the date of payment. The provisions of the act are special, and apply to a particular class of obligations against the Government. *Being special, these claims are not governed by the provisions of the prior general statute.* (R. S., sec. 3228.) Suits brought to recover money due under this act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. *The act, by its terms, creates and acknowledges the obligation of the Government.* A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. *It is, therefore, an obligation payable on demand, and the statute of*

limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. (United States v. Wardwell, 172 U. S., 48.)

"It will be observed that *under the provisions of this statute Congress has granted a right of repayment, regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgement by Congress of a supposed moral obligation; a provision as a bounty of the Government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial.* In the case of Thacher et al. v. The United States (149 Fed. Rep., 902) the tax was paid voluntarily and without protest. In passing upon the effect of the statutes above quoted the court said (p. 903):

"'The petitioners could not at any time have maintained suit to recover the tax as having been illegally collected. They had paid it voluntarily, not under protest. Their claim to a refund, if they had any, was moral only, and not legal. It appealed only to the Government's sense of fairness, and could be satisfied only by the bounty of the United States, given upon such terms as Congress saw fit to impose. * * * The act of 1902 fixes no time within which the claim for a refund must be filed with the collector, and no departmental regulation has been called to the attention of the court. Even if the limit fixed by Revised Statutes, section 3228, be applicable here by analogy, yet the two years therein mentioned must run, if they run at all, not from the payment of the tax, which was ineffective to create the claim here in suit, but from the passage of the act providing the bounty which the petitioners seek to obtain. That the tax paid by the petitioners in 1901

was illegally collected is irrelevant to the issues raised by this petition.'"

Opinions of the Attorney General, Vol. 26, p. 194, *197, 198.*

Thacher et al. v. The United States, 149 Fed. Rep. 902.

The reasoning of the Attorney General seems to us unanswerable and effectually disposes of the contentions made by the United States Attorney.

And speaking of the liberal policy of this Government, in refunding to its citizens taxes unlawfully and erroneously collected, the language used by the court in the case of Armour v. Roberts, 151 Fed. R. 846, *850*, involving the refunding of legacy taxes, is peculiarily appropriate.

Says the learned Judge in that case: "The United States Attorney and his assistant, in argument at the bar, conceded that the Government now has the large sum of money morally, and perhaps legally, belonging to plaintiffs, and, while not saying in language, the answer to the plaintiffs was, in effect and meaning, there is no way to reimburse the plaintiff. *The honor and integrity and fair dealing of our Government ought to be, and is, on the same high plane that exists between citizens of high character, and the powerful should not take from the weak without compensation, and the spirit of fair dealing of our Government can only be preserved by and through its agencies, one of which is the court.*

So that it follows, as will be conceded by every person, that the Government should make restitution of this money, and if the power to do so is not with some officer, it should be adjudged by this court, if it has the jurisdiction to do so.

"Whether the act of the Collector was a tort, or an implied contract to refund by his superior, must be determined from a very few facts. The Government, as per statutes, has the right to tax. The statute in question was open to two supposed constructions. The Commissioner of Internal Revenue adopted that construction in favor of the Government. In doing so, he acted in good faith, and with the best of motives. He believed he was within the law, and, so believing, exacted the return and the payment. But it turned out that he was mistaken in his interpretation of the statutes, as was held by the Supreme Court in the case of Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, denying the contention of the government and its law officers, and reversing the Circuit Court. So that whether, in the case at bar, the collector did a wrong amounting to a tort when he made the collection, must be decided. If it were a wrong, it can only be avoided by doing another wrong, viz., refused to abide by a recent decision of its highest court, concurred in by all the Justices. To establish one wrong, another wrong must be done."

We have also respectfully to remind this Court that in a similar case, Muenter v. Friederich, No. 2035, this Court, on November 1, 1912, denied the petition for Rehearing filed by the representative of the Government, in which he advanced precisely the same

argument, as to the applicability of sections 3226, 3227 and 3228 of the Revised Statutes, which he now urges upon this Court as his second contention.

Furthermore, there can be no "question of excessive valuation" in the case at bar, as contended by counsel for the Government on page 8 of his Petition for Re-hearing. The position of the defendant in error is that there can be no *tax whatever,* under any phase of the case that might be imagined. This is not a case of excessive valuation. This is a case where *no tax whatever* could lawfully be imposed by the Collector of Internal Revenue, for the reasons; first, that the *legacy* itself—the corpus of the legacy—is a contingent, beneficial interest, which this court has held, in its opinion rendered April 1, 1912, did not vest in the legatee, Harriet L. Herrmann, prior to the repeal of the War Revenue Act on July 1, 1902, and, second, that the *vested right* to the *income,* computed according to the official mortuary tables, (assuming, by analogy, that said vested right to the income is one for the *life* of Harriet L. Herrmann), does not amount to the taxable sum of $10,000.00, inasmuch as she was 36 years of age at the time of the death of her father, George D. Bliss, and a vested right to the income from a legacy of $14,872.26 left in trust *for life* to a person 36 years of age, computed according to the official mortuary

tables, would amount to $9,487.04, which sum, confessedly, is not large enough to be subject to any legacy tax.

In addition to the foregoing argument, we beg to refer to the several points and authorities contained in our brief in this and companion cases filed at the time of the original hearing in this case insofar as the same are applicable on this rehearing.

Without pursuing the subject further we contend that the decision of this court rendered April 1, 1912, (195 Fed. Rep. 480), affirming the judgment of the lower court in this case, should not be disturbed or changed.

MARSHALL B. WOODWORTH,
Attorney for Defendant in Error.

EDWARD LANDE,
Of Counsel.

NOTE

In verification of the correctness of our figures as to the clear value of a vested right to an income for life from a legacy of $14,872.26 left in trust for the benefit of a person 36 years of age, we append to this brief, in the shape of an exhibit "A," the computation of McLaren, Coode & Co., certified public accountants at San Francisco, and have attached the original of this exhibit to the original brief filed in this case and served upon the United States Attorney.

EXHIBIT "A"

McLAREN, GOODE & CO.
CERTIFIED PUBLIC ACCOUNTANTS
ALSO AT PORTLAND OREGON
AND LOS ANGELES
AGENTS FOR
DELOITTE, PLENDER, GRIFFITHS & CO.
OF
NEW YORK, LONDON, MEXICO CITY AND JOHANNESBURG

CABLE ADDRESS "CERTIFIED
CODES { BENTLEY'S / WESTERN UNION

519 CALIFORNIA STREET
(CORNER OF MONTGOMERY STREET)

San Francisco, Cal., May 8, 1913.

M. B. Woodworth, Esq.,
519 California Street,
San Francisco, California.

Dear Sir:

Referring to your inquiry of yesterday in regard to the present worth of the income of the life interest in a certain legacy, we report as follows:

Given

A life interest in $14,872.26 to a person 36 years of age,

To Find

The present worth according to United States tables.

Present worth of an annuity of $1.00 at 36 years	$15.94755
Annuity on legacy of $14,872.26 at 4% interest	$594.89
Present worth of the annuity of $594.89 at 36 years	$9,487.04

We are, Dear Sir,
Yours very truly,
McLAREN, GOODE & CO.

No. 2034

United States
Circuit Court of Appeals
For the Ninth Circuit.

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District,

Plaintiff in Error,

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Defendant in Error.

Brief of Plaintiff in Error on Rehearing.

JOHN L. McNAB,
United States District Attorney,
EARL H. PIER,
Assistant United States District Attorney,
Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals for the Ninth Circuit.

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District,

Plaintiff in Error,

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Defendant in Error.

Brief of Plaintiff in Error on Rehearing.

STATEMENT.

This case is one of five causes that were presented to this court upon writs of error for a review of the decision of the old Circuit Court, which decision presented the question of law as to whether or not the legacies involved in each of said causes were subject to taxation under the Spanish-American War Tax Act, because of the fact that in each case the property had been willed to trustees for certain uses. The decision in these cases was rendered by this court on the first day of April, 1912, and reported under the title of Muenter vs. The Union Trust Co., 195 Fed. 480.

At the time of the submission of these cases there was no question as to the value of the estates, the only question submitted being the question of whether or not as a matter of law, the estates were subject to tax.

The case of United States vs. The Fidelity Trust Co., 222 U. S. 158, laid down the principle that an estate given to a trustee to hold and pay the income therefrom over to a person during his natural life was a vested estate and was subject to the tax.

The question then arises as to whether or not in this particular case the estate is of such value as to be subject to the tax. In the trial of the case in the court below no issue whatever was raised as to the value of the estate.

The estate which was taxed in this matter passed to Harriet L. Herrmann by the will of George D. Bliss, deceased, in which he devised an undivided third of his estate to Jeremiah F. Sullivan in trust upon the following terms, namely:

> 1. To hold the same in trust for my daughter, Harriet L. Herrmann, so long as she continues to be the wife of George Herrmann.
> 2. To pay over to my said daughter annually the rents, issues, profits and income thereof after deducting the expenses of managing, controlling and operating the same.
>
> Said trust shall terminate whenever my said daughter ceases to be the wife of said George Herrmann. If my said daughter shall cease so to be the wife of said George Herrmann before her death, then and in that event the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike. The amount of the estate passing being $14,872.20.

ARGUMENT.

Under the decision of the United States vs. The Fidelity Trust Company, *supra,* there can be little doubt but that this is a vested estate within the

meaning of the Succession Tax Act of June 13, 1898, 30 Stats. at Large, 448, 464.

The question then arises as to what is the value of this estate and how it can be ascertained.

Under this provision of the will the estate which passes consists of a particular estate to Harriet L. Herrmann, with a contingent remainder to her children based upon the contingency that at the time of her death she shall be the wife of George Herrmann.

The value of this particular estate under the terms of the will is equal to at least a life interest.

Should she be divorced from George Herrmann, or should George Herrmann die in her lifetime, this fact would not in any way decrease or limit her enjoyment of the estate, but would only remove the restrictions upon her enjoyment of it. The fact that George Herrmann may outlive her, or that he may be divorced from her, or that he should die before she dies, cannot in any way decrease her interest in the property below that of a life interest, and the happening of either the contingency of a divorce from him or of his death before her death will only increase her use and enjoyment of her interest. Consequently the Government should be permitted to tax at least a life interest in this estate, which can be definitely ascertained.

Under the common law, and as I understand it, the rule has not been changed in California, where a particular estate and a remainder are vested in the same person, they merge and become one estate. If there is any additional estate besides a life estate which Harriet L. Herrmann has vested in her, that

also should be subject to a tax.

The value of this portion of the estate is a question of fact to be determined by the Court upon the hearing of evidence. The value of the children's contingent interest, namely, that their mother must die while still the wife of George Herrmann, is such a remote contingency that the Court should practically ignore the same, and should consider that for purposes of taxation Harriet L. Herrmann received the whole of the estate. At any rate, the only part of the estate which Harriet L. Herrmann does not receive is the value of this contingent remainder which may possibly vest in the children, and the burden of proving the value of this interest is upon the plaintiff seeking to recover the tax.

If the Court sees fit to reverse this matter and remand it to the lower Court for further proceedings, another question which will undoubtedly arise in the trial of the case will be as to whether or not plaintiff is entitled to recovery under sections 3226, 3227 and 3228 of the Revised Statutes, which read as follows:

> "Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had

therein: Provided, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: Provided, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: Provided, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

The tax was assessed upon the interest passing to Harriet L. Herrmann and not upon the interest

passing to her children. Her interest is not a contingent interest, but is a vested interest.

Counsel for the defendants in error will undoubtedly cite the Daly case, 26 Op. Atty. Genl. 194, to the effect that this case does not come within the provisions of said sections of the Revised Statutes by reason of section 3 of the Act of Congress of June 27, 1902 (32 Stat. 406). Section 3 is as follows:

> "Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act, approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

A careful reading of the opinion will show that section 3 applies only to the recovery of taxes paid upon contingent beneficial interests. Under the ruling of this Court and the Supreme Court in the United States vs. The Fidelity Trust Company this

is not a contingent beneficial interest, and therefore does not come within the Act of June 27, 1902; consequently the procedure for the recovery of money paid to the Collector of Internal Revenue by reason of excessive valuation of the estate is that outlined in the cited sections of the Revised Statutes. The Government contends that the plaintiff below should show, before he is entitled to recovery, that he has complied with said sections.

Hicks vs. James' Administratrix, 48 Federal, 542.

Neither the protest nor claim presented to the Commissioner shows that the question of excessive valuation was presented to the Commissioner for his decision.

The grounds of illegality of tax should be pointed out to the Commissioner, otherwise the procedure before him would be useless.

The statute intends that a claim should be considered on its merits by the Commissioner of Internal Revenue before suit is brought, and the grounds upon which an appeal is sought must be set forth in the claim, so that the Commissioner may properly pass upon the merits of the claim, otherwise a claimant might place fictitious reasons in his claim, have his claim rejected, and bring suit, thus getting into the courts without having in good faith followed the procedure laid down by the statutes.

Nowhere in the claim is any contention made of an excessive valuation of the estate, and until the Commissioner of Internal Revenue has been called upon to pass upon such a question, suit should not

be brought in the courts to recover the tax alleged to have been collected upon the excessive valuation.

Our contention therefore is that the Court should reverse the judgment of the Court below.

Respectfully submitted,

JOHN L. McNAB,
United States Attorney.

EARL H. PIER,
Assistant United States Attorney.

No. 2034.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District,

PLAINTIFF IN ERROR,

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of George D. Bliss, deceased,

DEFENDANT IN ERROR.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

JOHN L. McNAB,
United States District Attorney;

EARL H. PIER,
Assistant United States District Attorney,

ATTORNEYS FOR PLAINTIFF IN ERROR.

No. 2034.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District,

Plaintiff in Error,

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of George D. Bliss, deceased,

Defendant in Error.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

The plaintiff in error deeming himself aggrieved by the judgment of this Court made and entered herein on the first day of April, 1912, presents this his petition, praying that a rehearing of the above entitled cause may be granted by this Honorable Court.

In affirming the judgment of the Court below, this Court decided that since the income was to be paid to Harriet

L. Herrmann as long as she remained the wife of her husband, the estate in the income is too uncertain to admit of measurement as to value and that therefore judgment for the defendant in error, the plaintiff below, should be affirmed.

The plaintiff in error contends:

I.

That there is an interest passing to the said Harriet L. Herrmann which can be definitely ascertained.

II.

The value being ascertainable, the Court should make a final disposition of the case upon the record in favor of plaintiff in error.

ARGUMENT.

I.

Is the estate ascertainable?

The decision of the Court fails to take into consideration all the terms of the trust clause under which Harriet L. Herrmann received the property. We would direct the Court's attention once more to the provisions of the will as shown by the consolidated Bill of Exceptions in the case of *Muenter* vs. *Union Trust Co.,* No. 2031, pages 125 and 126, in which it is stated that after giving an undivided one-third part to each of two daughters, that the deceased gave the remaining undivided third to Jeremiah F. Sullivan in trust upon the following terms, namely:

"1. To hold the same in trust for my daughter, Harriet L. Herrmann, so long as she continues to be the wife of George Herrmann.

* * * * * * * * * *

"3. To pay over to my said daughter annually the rents, issues, profits and income thereof after deducting the expenses of managing, controlling and operating the same.

"Said trust shall terminate whenever my said daughter ceases to be the wife of said George Herrmann. If my said daughter shall cease so to be the wife of said George Herrmann before her death, then and in that event the property embraced in said trust shall vest in fee simple absolute in my said daughter, Harriet L. Herrmann. In case my said daughter dies while she is the wife of said George Herrmann, in that event the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike."

Under the terms of this will it is readily seen that the smallest interest which Harriet L. Herrmann has in the property which is given her under the will is a life interest in said estate under which she is to receive the income, rents and profits thereof during her whole life, provided she still remains the wife of George Herrmann and if at any time she should cease to be George Herrmann's wife she comes into possession of the whole estate, so that if the contingency which the court points out should occur at any time short of the death of the said Harriet L. Herrmann, the happening of such contingency, to wit: the ceasing to be the wife of George Herrmann, would serve to increase the value of the estate which she took under the will of George D. Bliss, deceased, and could not in any way decrease the value.

It being thus shown that there is a minimum value of the estate passing to Harriet L. Herrmann which may be definitely ascertained, this case comes within the rule laid down in the case recently decided by the *Supreme Court of United States* vs. *Fidelity Trust Co.*, 222 U. S., 158.

II.

The value of the estate being definitely ascertained, the question arises as to what disposition should the court make of the case.

In the complaint in this action the value of the estate passing to Harriet L. Herrmann is fixed at $14,872.26. This is the value that was placed upon such interest by an executor. It is the value that was placed upon it by the Collector of Internal Revenue and upon which the tax was collected and this value is expressly acquiesced in by the complainant in bringing his action to recover the tax collected thereon. (Paragraph 6 of complaint, page 3 of record in case No. 2034.)

The court should therefore reverse the judgment of the court below and remand the case with instructions that judgment be entered for defendant.

This is not a case in which the defendant in error should be permitted to amend his pleadings:

(a) The plaintiff having tried his case upon one theory and lost, he should not be permitted to again try his case upon another theory, particularly where the plaintiff knew the facts, to wit: that the Collector of Internal Revenue had not figured out the value of the life estate passing to Harriet L. Herrmann at the time of fil-

ing this complaint and therefore at this late date after judgment, should not be permitted to amend his pleadings.

(b) Should the plaintiff below be allowed to amend his pleadings for the purpose of contesting the alleged excessive valuation of the estate, he thereby changes his cause of action to one which is barred by the statute of limitations and the disposition at present made of the case prevents defendant below from setting up the same.

The present action is brought under Sec. 3, Act of June 27, 1902, 32 Stats. L., 406.

> "Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The estate herein not being a contingent interest, recovery cannot be had under this statute and if plaintiff below recovers at all it must be under the general provisions relating to internal revenue for recovery of tax.

These are sections 3226, 3227 and 3228 of the Revised Statutes of the United States:

> "Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: Provided, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

> "Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: Provided, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in

the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: Provided, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

Section 3226 requires that after appeal has been taken to the Commissioner of Internal Revenue, suit may be brought without first having decision of said Commissioner, should he delay his decision, *at any time within the period limited in the next section* (3227).

Section 3227 requires that suit be brought within two years.

According to the complaint:

Tax was paid February 3, 1904.

Claim filed with Commissioner of Internal Revenue February 2, 1906.

Complaint filed June 8, 1908.

No decision was made by the Commissioner of Internal Revenue upon claim filed in this matter.

The question then becomes: When did the statute commence to run?

Section 3228 requires that claims be presented within two years after cause of action accrued, which must mean two years after payment of tax under protest.

Consequently, I take it that the cause of action accrued upon payment of tax, and plaintiff below must file his complaint within two years.

The rule limiting actions which will give effect to all clauses of these statutes is:

Action must be brought within two years of paying tax.

As a condition precedent claim must be filed with Commissioner of Internal Revenue, and his decision obtained or six months elapse after filing said claim.

Any other interpretation put upon said statutes would not give effect to all of them.

(c) If the Court believes that the record does not sufficiently show that the statute of limitations has run, defendant below should be given an opportunity to plead same as a defense.

(d) Neither the protest nor claim presented to the Commissioner shows that the question of excessive valuation was presented to the Commissioner for his decision.

The grounds of illegality of tax should be pointed out to the Commissioner, otherwise the procedure before him would be useless.

The statute intends that a claim should be considered on its merits by the Commissioner of Internal Revenue before suit brought, and the grounds upon which an

appeal is sought must be set forth in the claim so that the Commissioner may properly pass upon the merits of the claim, otherwise, a claimant might place fictitious reasons in his claim, have his claim rejected, and bring suit, thus getting into the courts without having in good faith followed the procedure laid down by the statutes.

Hicks vs. *James' Administratrix,* 110 U. S., 272; affirmed 48 Fed. 542.

Nowhere in the claim is any contention made of an excessive valuation of the estate and until the Commissioner of Internal Revenue has been called upon to pass upon such a question, suit should not be brought in the courts to recover the tax alleged to have been collected upon the excessive valuation.

We therefore contend that this Court should reverse the judgment of the court below, and at least give plaintiff in error an opportunity to avail himself, if he so desires, of the defenses:

1. Statute of Limitations.
2. That claim was not properly presented to Commissioner of Internal Revenue.

Respectfully submitted,

JOHN L. McNAB,
United States Attorney.

EARL H. PIER,
Assistant United States Attorney.

I hereby certify that the above and foregoing Petition for Rehearing is, in my judgment, well founded and that the same is not interposed for delay.

John L. McNab,
United States Attorney.
Attorneys for Plaintiff.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District of Cal.,
Plaintiff in Error,

vs.

GEORGE D. BLISS, as Executor of the last Will and Testament of George D. Bliss, deceased,
Defendant in Error.

No. 2034

REPLY BRIEF TO PETITION FOR REHEARING

MARSHALL B. WOODWORTH,
Attorney for Defendant in Error.

UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District of Cal.,
Plaintiff in Error,

vs.

GEORGE D. BLISS, as Executor of the last Will and Testament of George D. Bliss, deceased,
Defendants in Error.

No. 2034

REPLY BRIEF TO PETITION FOR REHEARING.

The plaintiff in error has filed a petition for rehearing. While he urges nothing which merits any consideration, still he has fallen into such glaring error, in contending that there was a non-compliance with sections 3226, 3227, and 3228 of the Revised Statutes, with respect to the presentation of a claim, that we feel that it is our duty to submit this brief reply.

As stated by counsel for plaintiff in error, the present action is brought under section 3 of the Act of

June 27, 1902, (32 Stats. L.. 406), commonly known as the "Refunding Act".

Under this act, the Honorable Attorney General has held that the provisions of the Act of 1902 are special and apply to a particular class of obligations against the Government, and, being special, these claims are not governed by the provisions of a prior general statute, section 3228, Revised Statutes.

The learned Attorney General further held that suits for the recovery of money due under the "Refunding Act" of June 27, 1902, *are not actions for the recovery of taxes*, but for money held by the Government *in trust for the benefit of the parties to whom it rightfully belongs.*

> See Opinions of Attorney General, Vol. 26, p. 194, *197, 198.*

Says the learned Attorney General: "It will be observed that under the provisions of this statute Congress has granted a right of repayment, regardless of any condition that may have heretofore operated as a bar to such repayment. The statute is an acknowledgement by Congress of a supposed moral obligation; a provision as a bounty of the Government."

It has even been held that the fact that no protest was made against the payment of the tax is immaterial and that a recovery may be had under the "Re-

funding Act". notwithstanding that no protest was made.

> Thacher et al. v. The United States, 149 Fed. Rep. 902.

We therefore respectfully submit that the argument advanced by the learned counsel for plaintiff in error has absolutely no relevancy or applicability to the present case, and that the petition for rehearing must be denied.

Respectfully submitted

MARSHALL B. WOODWORTH

Attorney for defendant in error.

No. 2044

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

TSUJI SUEKICHI,

Appellee.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. **Page**

Names and Addresses of Attorneys.

For Petitioner, Suekichi Tsuji:

J. LIGHTFOOT, Esq., 207–208 McCandless Bldg., Honolulu, T. H.

For Respondent, Raymond C. Brown, U. S. Immigration Inspector in Charge at the Port of Honolulu:

ROBERT W. BRECKONS, United States District Attorney, Honolulu, T. H. [1*]

In the District Court of the United States, in and for the District and Territory of Hawaii.

No. 42.

In the Matter of the Application of SUEKICHI TSUJI, for a Writ of Habeas Corpus.

Statement [of Clerk, District Court].

Time of Commencing Suit:

July 3, 1911: Verified petition for writ of habeas corpus filed and writ issued to the United States Marshal for the District of Hawaii.

Names of Original Parties:

Petitioner: Suekichi Tsuji.

Respondent: Raymond C. Brown, U. S. Inspector of Immigration in charge at the Port of Honolulu.

Dates of the Filing of the Pleadings.

July 3, 1911: Petition.

July 18, 1911: Return of Raymond C. Brown to writ of habeas corpus.

July 19, 1911: Supplemental return of Raymond C. Brown to writ of habeas corpus.

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*Page number appearing at foot of page of original certified Record.

July 24, 1911: Answer to return and supplemental return of Raymond C. Brown.

Service of Process.

July 3, 1911: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said writ afterwards returned into court with the following return by the said United States Marshal:

"The within petition and writ of habeas corpus was received by me on the 3d day of July, A. D. 1911, and is returned as executed upon RAYMOND C. BROWN, United States **[2]** Immigration Inspector at the Port of Honolulu, T. H., by handing to and leaving with him duly certified copies of the within petition and writ of habeas corpus on the 3d day of July, A. D. 1911. Petition and writ of habeas corpus returned to Clerk U. S. District Court on this 6th day of July, A. D. 1911."

July 26, 1911: Hearing on return and supplemental return of Immigration Inspector.

The above hearing was had before Honorable Charles F. Clemons, Judge of said Court.

Decision.

July 29, 1911: Decision of cause.

July 31, 1911: Judgment filed and entered.

August 7, 1911: Petition for appeal.

United States of America,
Territory of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct

statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the summons and the time when the judgment herein was rendered and the Judge rendering the same, in the matter of the Application of Suekichi Tsuji, for a Writ of Habeas Corpus, Number 42, in the United States District Court for the Territory of Hawaii. **[3]**

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 11th day of September, A. D. 1911.

[Seal] A. E. MURPHY,
Clerk, United States District Court, Territory of Hawaii. **[4]**

In the District Court of the United States, in and for the District and Territory of Hawaii.

In the Matter of the Application of SUEKICHI TSUJI, for a Writ of Habeas Corpus.

Petition for a Writ of Habeas Corpus.

To the Honorable CHARLES F. CLEMONS, Judge of the District Court of the United States, in and for the District and Territory of Hawaii:

The undersigned, Suekichi Tsuji, petitioner herein, respectfully represents and shows to this Honorable Court as follows:

FIRST:

The petitioner is a subject of the Emperor of Japan; that heretofore, to wit, on or about the 27th

day of July, A. D. 1906, petitioner arrived at Honolulu, Oahu, aboard the S. S. "Manchuria," he having embarked on said steamship in Japan, and thereupon petitioner was duly admitted to the Territory of Hawaii, and since the last-mentioned date has had his domicile in Honolulu aforesaid.

SECOND:

That prior to the arrival of petitioner in the Territory of Hawaii as aforesaid, he had been duly and lawfully married according to the laws of the Empire of Japan to Masa Tsuji; and that said Masa Tsuji arrived in Honolulu aforesaid, on or about the 28th day of August, A. D. 1906, aboard the S. S. "America Maru"; and at all times since the last-mentioned date to the date hereof, the said Masa Tsuji has resided and had her domicile in Honolulu aforesaid.

[5]

THIRD:

That on or about the 26th day of September, A. D. 1910, petitioner departed from the port of Honolulu aboard the S. S. "China," bound for the Empire of Japan, to which country petitioner desired to go for a short visit, and upon leaving said port of Honolulu and at all times thereafter, petitioner intended to return to said Honolulu and to continue to reside in said Honolulu; that said petitioner, during his intended temporary absence as aforesaid, left his said wife in Honolulu aforesaid.

FOURTH:

That petitioner returned to the port of Honolulu on or about the 17th day of June, A. D. 1911, aboard the S. S. "Korea."

FIFTH:

That upon the arrival of petitioner at the port of Honolulu, on the date last aforesaid, and at all times since the last-mentioned date, Raymond C. Brown, Esq., United States Immigration Inspector at the said port of Honolulu, has refused a landing to your petitioner, as petitioner is informed and believes, and upon such information and beliefs alleges and avers, under the claim or pretense that your petitioner is an immigration alien and as such, a person belonging to an excluded class under the Immigration Laws of the United States; whereas in truth and in fact, your petitioner is a nonimmigrant alien and not subject to said immigration laws.

SIXTH:

And your petitioner further shows that he is held in custody, detained, imprisoned and deprived of his liberty by said Raymond C. Brown, as petitioner is informed and believes and upon such information and beliefs alleges and avers, under and *by of* the claim as aforesaid; and your petitioner further shows that said holding in custody, detention and imprisonment is illegal for the reasons hereinabove set forth.

[6]

WHEREFORE, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of habeas corpus, to be directed to the said Raymond C. Brown, Immigration Inspector as aforesaid, may issue in this behalf, so that your petitioner may be forthwith brought before this Honorable

Court, to do, submit to, and receive what the law may direct.

Dated Honolulu, July 3, 1911.

(Sgd.) JAPANESE CHARACTERS.
(SUEKICHI TSUJI.)

United States of America,
Territory of Hawaii,—ss.

Suekichi Tsuji, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the said statements made are true as he verily believes.

(Sgd.) JAPANESE CHARACTERS.
(SUEKICHI TSUJI.)

Subscribed and sworn to by said Suekichi Tsuji before me, and by me subscribed, on this 3d day of July, A. D. 1911.

[Seal] (Sgd.) J. B. LIGHTFOOT,
Notary Public, District of Honolulu, Territory of Hawaii.

[Order Allowing Writ to Issue.]

Let the writ issue as herein prayed.

July 3d, 1911.

(Sgd.) CHARLES F. CLEMONS,
Judge of the United States District Court, Hawaii.

[7]

In the District Court of the United States, in and for the District and Territory of Hawaii.

In the Matter of the Application of SUEKICHI TSUJI, for a Writ of Habeas Corpus.

Writ of Habeas Corpus.

The United States of America, to Raymond C. Brown, Esq., United States Immigration Inspector, at the Port of Honolulu, Territory of Hawaii:

WE COMMAND YOU that the body of Suekichi Tsuji, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before the Honorable CHARLES F. CLEMONS, Judge of our District Court of the United States, in and for the District and Territory of Hawaii, to do and receive all and singular those things which the said Judge shall then and there consider of him in this behalf; and have you then and there this Writ.

Witness the Honorable CHARLES F. CLEMONS, Judge of the District Court of the United States, in and for the District and Territory of Hawaii, this 3d day of July, A. D. 1911.

[Seal] A. E. MURPHY,
Clerk.
By (Sgd.) F. L. Davis,
Deputy Clerk. **[8]**

United States Marshal's Office.

MARSHAL'S RETURN.

The within petition and writ of habeas corpus was received by me on the 3d day of July, A. D. 1911, and

is returned as executed upon RAYMOND C. BROWN, United States Immigration Inspector at the Port of Honolulu, T. H., by handing to and leaving with him duly certified copies of the within petition and writ of habeas corpus on the 3d day of July, A. D. 1911. Petition and writ of habeas corpus returned to clerk of U. S. District Court on this 6th day of July, A. D. 1911.

(Sgd.) E. R. HENDRY,
United States Marshal.

[Endorsed]: No. 42. (Title of Court and Cause.) Petition and Writ. Filed Jul. 3, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[9]

[Order Allowing Respondent Until July 13, 1911, to Answer.]

From the Minutes of the United States District Court, Vol. 7, Page 532, Friday, July 7, 1911.

[Title of Court and Cause.]

On this day came Mr. W. T. Rawlins, Assistant United States District Attorney, on behalf of the respondent herein, Raymond C. Brown, Inspector in Charge of the Immigration Service of the United States, who was present as was the petitioner herein also, and it appearing to the Court that the respondent herein has not had sufficient time in which to make answer to the petition, it was by the Court ordered that the respondent herein have to and including July 13, 1911, at 10 o'clock A. M., to make answer to said petition, and that the petitioner,

Suekichi Tsuji, be remanded to the custody of the respondent herein. **[10]**

[Order Admitting Petitioner to Bail Upon Giving of Bond.]

From the Minutes of the United States District Court, Vol. 7, Page 533, Saturday, July 8, 1911.

[Title of Court and Cause.]

On this day came Mr. J. Lightfoot, counsel for the petitioner herein, and Mr. R. W. Breckons, United States Attorney, on behalf of the respondent herein, Raymond C. Brown, Inspector in Charge of the Immigration Service of the United States, who was absent, as was the petitioner herein also, and upon motion of Mr. Lightfoot, counsel for said petitioner, that petitioner be admitted to bail upon his furnishing a satisfactory bond, it was by the Court ordered that the petitioner be admitted to bail upon his giving a bond in the sum of $2,000. **[11]**

[Order Extending Respondent's Time to Answer Until July 18, 1911.]

From the Minutes of the United States District Court, Vol. 7, Page 539, Thursday, July 13, 1911.

[Title of Court and Cause.]

On this day came Mr. R. W. Breckons, United States Attorney, on behalf of the respondent herein, Raymond C. Brown, Inspector in Charge of the Immigration Service of the United States, who was absent as was the petitioner herein and his counsel also. It was by the Court ordered that this matter

be continued to July 18, 1911, at 10 o'clock A. M., for answer to the petition herein by the respondent. [12]

[Order Continuing Matter to July 21, 1911, for Hearing on Petition.]

From the Minutes of the United States District Court, Vol. 7, Page 543, Tuesday, July 18, 1911.

[Title of Court and Cause.]

On this day came Suekichi Tsuji, the petitioner herein, with his counsel Mr. J. Lightfoot, and the respondent herein Raymond C. Brown, United States Inspector of Immigration, with Mr. R. W. Breckons, United States District Attorney, whereupon. Mr Breckons stated to the Court that the return of said respondent has been this day filed, and upon motion of Mr. Breckons, it was by the Court ordered that this cause be continued to July 21, 1911, at 9 o'clock A. M., for hearing on the petition for a writ of habeas corpus herein. [13]

In the District Court of the United States, in and for the Territory and District of Hawaii.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Return of Raymond C. Brown to Writ of Habeas Corpus.

The Return of Raymond C. Brown, Esq., United States Immigration Inspector in Charge at the Port of Honolulu, Territory of Hawaii, to the Writ of Habeas Corpus Hereto Attached:

In obedience to the writ of habeas corpus heretofore issued in this case, I do hereby certify and return to the Honorable CHARLES F. CLEMONS, Judge of the above-entitled court, as follows:

First. I am and have been for more than five years last past United States Inspector of Immigration in charge at the port of Honolulu, in the Territory of Hawaii.

Second. That heretofore and on, to wit, the 17th day of June, A. D. 1911, one TSUJI SUEKICHI arrived at the port of Honolulu, in the District and Territory of Hawaii, by the steamship "Korea," from the Empire of Japan.

Third. That on the arrival of the steamship "Korea," at the port of Honolulu, on the 17th day of June, it did not appear to the examining Immigration Inspector of the United States of America, who examined the said TSUJI SUEKICHI, that the said TSUJI SUEKICHI was clearly and beyond doubt entitled to land, and thereupon the said TSUJI SUEKICHI, was detained for examination in relation thereto, by a Board of Special Inquiry. [14]

Fourth. That during all times in the month of June, A. D. 1911, the said Harry B. Brown, Edwin Farmer and Louis Caesar were a duly appointed, qualified and acting Board of Special Inquiry at the port of Honolulu, in the said Territory and District.

Fifth. That thereafter and on, to wit, the 19th day of June, A. D. 1911, the said Board of Special Inquiry did convene and did accord to the said TSUJI SUEKICHI a hearing concerning the right of him, the said TSUJI SUEKICHI, to land in the

United States of America, and that thereafter and on, to wit, the 19th day of June, A. D. 1911, the said Board of Special Inquiry did hold and determine that the said TSUJI SUEKICHI had no right to land in the United States of America, and ordered that the said TSUJI SUEKICHI be rejected and sent back to Japan, as a person convicted of the crime involving moral turpitude. A copy of the record of the Special Board of Inquiry is attached hereto and made a part hereof and marked Exhibit "A."

Sixth. That thereafter and on, to wit, the said 19th day of June, A. D. 1911, the said TSUJI SUEKICHI did waive his right of appeal from the said finding and order of the said Board of Special Inquiry and that at no time since the said 19th day of June, A. D. 1911, has the said TSUJI SUEKICHI appealed from said finding and order.

Seventh. That the said TSUJI SUEKICHI is not a citizen of the United States, but is a subject of the Empire of Japan, and was within the meaning of the laws of the United States of America, an alien who had been convicted of the crime involving moral turpitude.

Eighth. Prior to the time when the said Board of Special Inquiry did order that the said TSUJI SUEKICHI be deported, a hearing was accorded said TSUJI SUEKICHI on the question of whether [15] or not he had been convicted of the crime involving moral turpitude; upon said hearing the said TSUJI SUEKICHI did testify as is set forth in the proceedings of said Board in Exhibit "A."

(Sgd.) RAYMOND C. BROWN.

United States of America,
Territory of Hawaii,—ss.

Raymond C. Brown, being first duly sworn according to law, deposes and says that he is the Raymond C. Brown who has made the return to the writ of habeas corpus in the above-entitled cause, that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RAYMOND C. BROWN.

Subscribed and sworn to before me this 18th day of July, A. D. 1911.

[Seal] (Sgd.) F. L. DAVIS,
Deputy Clerk, United States District Court, Territory of Hawaii. [16]

[Exhibit "A" to Immigration Inspector's Return to Writ—Record of Board of Special Inquiry, U. S. Immigration Service.]

UNITED STATES IMMIGRATION SERVICE.
Record of Board of Special Inquiry. Convened June 19, 1911.
Members of Board: Harry B. Brown, Edwin Farmer and Louis Caesar.
Case of TSUJI SUEKICHI. Manifest N 1-1.
Ex. SS. "Korea," June 17, 1911. Intr. Katsunuma.

[Testimony of Tsuji Suekichi, Before Board of Special Inquiry, U. S. Immigration Service.]

Alien sworn, testifies:
(By Inspr. HARRY B. BROWN.)

Q. What is your name? A. Tsuji Suekichi.
Q. What is your age? A. 29, 11 months.

Q. Are you traveling alone? A. Yes.
Q. Where were you born?
A. Hongomura, Fukuoka Ken, Japan.
Q. Are you married or single? A. Married.
Q. What is the name of your wife?
A. Marsuzo.
Q. How many children have you?
A. One child.
Q. What is the age and name?
A. Etsuji, 10 yrs. old.
Q. Boy or gi*lr*? A. Boy.
Q. Where is your wife? A. Honolulu.
Q. Where is your son? A. Japan.
Q. Where was your son born?
A. Same place of myself.
Q. Can you read and write?
A. Yes, only my name.
Q. On what ship and from what port did you arrive? A. SS. "Korea," from Nagasaki.
Q. Who paid your passage? *Self.*
Q. What is your occupation?
A. Farm laborer, Japan.
Q. Have you been in United States before?
A. Yes.
Q. Where? A. Honolulu.
Q. When did you first come to Honolulu?
A. July, 1906.
Q. When did you go to Japan?
A. It was in Sept., 1910.
Q. Are you going to join anyone here?
A. No, simply going to Honolulu.
Q. Have you notified anyone of your arrival here?

A. No.

Q. How much money have you with you?

A. About $2.

Q. What did you work at while you were in Hawaii? A. Hackdriver.

Q. How long were you a *jack*-driver?

A. About 2 years.

Q. Where was your stand? A. Kukui Street.

Q. Where did you live? A. Palama.

Q. Did you live with your wife? A. Yes.

Q. What did she do? A. She was a prostitute.

Q. Where did she practice prostitution?

A. Iwilei.

Q. When did she start to practice prostitution in Iwilei? A. I cannot remember when it was.

Q. Was it about the time you started to drive a hack? A. I think not.

Q. After or before?

A. After I started my hack business.

Q. In your business it sometimes came to take persons to Iwilei, was it not? A. Yes, sir.

Q. And when a man told you to take him to Iwilei did you take him to where your wife was?

A. No, sir.

Q. While she was practicing prostitution did she turn over her earnings to you or did you receive any part of them? A. No, sir.

Q. Have you ever been convicted of any crime in any of the courts of the U. S. or Japan?

A. Not in Japan.

Q. In the United States? A. Yes.

Q. What Court?

(Case of Tsuji Suekichi.)

A. The U. S. Court, Honolulu. [17]

Q. Were you sent to jail? A. Yes.

Q. For how long? A. 3 months.

Q. Did you serve your sentence? A. Yes.

Q. Was there a fine attached to your sentence?

A. No, sir.

Q. Of what crime were you convicted?

A. My wife practiced prostitution.

Q. Where did you get the money to go to Japan?

A. With money which I sold my hack.

Q. Have you sent your wife any money since you have been in Japan? A. No.

Q. Have you been divorced from this woman?

A. No, sir.

Q. Are you going to live with her again?

A. Yes.

Q. When did you receive the last letter from her?

A. I cannot remember.

Q. Was she still practicing prostitution when you received that letter?

A. She did not mention that part.

Q. Was she practicing prostitution when you went to Japan?

A. Yes, but I am going to stop that business.

Q. How long *have you been* released from jail did you go to Japan? A. About 7 months.

Q. Did you cohabit with your wife after you had been released from jail and before you left for Japan? A. Yes.

Q. It is a fact that you were convicted and sentenced and served your sentence as a result of being

implicated and connected with your wife in her business as a prostitute; she being a prostitute and you being a procurer or pimp as it were?

A. Yes, exactly.

Q. Have you made arrangements in Japan for some more to come here?

A. No. I returned to Japan for my health.

Q. Is there any further statement you wish to make? A. No.

(Inspr. FARMER.)

Q. Did your wife ever practice prostitution in Japan before she came here? A. No.

I move that this alien be rejected and be sent back to Japan as a person convicted of a crime involving moral turpitude, as provided in Section 2, of act of Feb. 20, 1907.

Mr. CAESAR.—I second the motion.

Inspr. BROWN.—It is so ordered.

ALIEN REJECTED AND NOTIFIED OF HIS RIGHT TO APPEAL.

(Sgd.) HARRY B. BROWN,
(Sgd.) EDWIN FARMER,
(Sgd.) LOUIS CAESAR,
Board of Special Inquiry.

June 20, 1911—Alien waives his right of appeal.

[18]

(Case of Tsuji Suekichi.)

The foregoing testimony is a correct record of my statements before the Board of Special Inquiry.

(Sgd.) JAPANESE CHARACTERS.

Before signing the above, the applicant heard the testimony translated to him, by me, in the Japanese

language, and he acknowledged it to be a true and correct record of his statements before the Board of Special Inquiry.

(Sgd.) TOMIJO KATSUNUMA,
Japanese Interpreter.

The applicant was told of his right of appeal, by me acting as Japanese interpreter for the Inspector in Charge, and thereupon he, the applicant, stated to the Inspector in Charge, through me as Japanese interpreter, that he desried to waive such right.

(Sgd.) TOMIJO KATSUNUMA,
Japanese Interpreter.

[Endorsed]: No. 42. (Title of Court and Cause.) Return of Raymond C. Brown to Writ of Habeas Corpus. Filed, Jul. 18, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [19]

In the District Court of the United States, in and for the Territory and District of Hawaii.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Supplemental Return of Raymond C. Brown to Writ of Habeas Corpus.

Comes now RAYMOND C. BROWN, supplementing the return in the above-entitled matter heretofore made on the 18th day of July, A. D. 1911, and says as follows, to wit: That heretofore and on, to wit, the 18th day of April, A. D. 1909, the abovenamed Tsuji Suekichi was indicted in the District Court of the United States, within and for the Territory and District of Hawaii, for the crime of im-

porting and harboring for the puspose of prostitution an alien woman named Masuyo Tsuji, she being the same woman named in paragraph 2 for the writ of habeas corpus herein; that thereafter and on to wit, the 18th day of November, A. D. 1904, on a plea of guilty theretofore entered in said criminal cause, the said Tsuji Suekichi was sentenced by the Court to imprisonment for the term of three months, and that said sentence was duly executed by the confinement of the said Tsuji Suekichi in the prison provided by law; and that a copy of said indictment upon which the said Tsuji Suekichi was convicted as aforesaid is attached to this supplemental return and is made a part thereof.

(Sgd.) RAYMOND C. BROWN. **[20]**

United States of America,
Territory of Hawaii,—ss.

Raymond C. Brown, being first duly sworn according to law, deposes and says that he is the Raymond C. Brown who has made the supplemental return to the writ of habeas corpus in the above-entitled cause; that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RAYMOND C. BROWN.

Subscribed and sworn to before me this 19th day of July, A. D. 1911.

[Seal] (Sgd.) F. L. DAVIS,
Deputy Clerk, United States District Court, Territory of Hawaii. **[21]**

[Indictment.]

United States of America,
District of Hawaii,—ss.

In the District Court of the United States in and for the District Aforesaid, at the October Term Thereof, A. D. 1908.

THE GRAND JURORS OF THE UNITED STATES, impaneled, sworn and charged at the Term aforesaid of the Court aforesaid, on their oath present that SUEKICHI TSUJI, on the first day of December, in the year of our Lord one thousand nine hundred and eight, in the said District and within the jurisdiction of this Court, did unlawfully and feloniously keep, maintain, control, support and harbor, within a certain house and place within the Territory and District of Hawaii, for a certain immoral purpose, to wit, for the puepose of prostitution, a certain alien woman named MASUYO TSUJI, she, the said MASUYO TSUJI, having within three years of said first day of December, in the year of our Lord one thousand nine hundred and eight, to wit, on the twenty-eighth day of August, in the year of our Lord one thousand nine hundred and six, entered the United States of America, at the port of Honolulu, in the District and Territory of Hawaii, from the Empire of Japan, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

ROBERT W. BRECKONS,
United States Attorney.

[Endorsed]: No. 42. (Title of Court and Cause.) Supplemental Return of Raymond C. Brown to Writ of Habeas Corpus. Filed, Jul. 19, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. **[22]**

[Order Continuing Cause for Hearing Until Called Up.]

From the Minutes of the United States District Court, Vol. 7, Page 546, Friday, July 21, 1911.

[Title of Court and Cause.]

On this day came Suekichi Tsuji, the petitioner herein, with his counsel, Mr. J. Lightfoot and Mr. R. W. Breckons, United States District Attorney, counsel for the respondent Raymond C. Brown, and this cause was called for hearing on petition for writ of habeas corpus. Thereupon it was by the Court ordered that this cause be continued for hearing until called up. **[23]**

In the District Court of the United States, in and for the District and Territory of Hawaii.

In the Matter of the Application of SUEKICHI TSUJI, for a Writ of Habeas Corpus.

Answer.

Now comes Suekichi Tsuji, petitioner above named, and for answer to the return and Supplemental Return filed in the above-entitled court and cause by Raymond C. Brown, respondent, says:

FIRST:

Petitioner admits each and every the allegations

contained in the said return and supplemental return.

SECOND:

Petitioner is informed and believes, and upon such information and belief, alleges and avers that the indictment attached to respondent's supplemental return together with all proceedings had thereon, including the plea of guilty entered thereon by the petitioner, is null and void, for the reason that the law alleged in said indictment to have been violated by petitioner as unconstitutional and void.

THIRD:

And for further answer to said return and amended return this petitioner further shows: That he is entitled to land in the Territory of Hawaii by reason of the following facts, to wit:

The petitioner is a subject of the Emperor of Japan; that heretofore, to wit, on or about the 27th day of July, A. D. [24] 1906, petitioner arrived at Honolulu, Oahu, aboard the S. S. "Manchuria," he having embarked on said steamship in Japan, and thereupon petitioner was duly admitted to the Territory of Hawaii, and since the last-mentioned date has had his domicile in Honolulu aforesaid.

That prior to the arrival of petitioner in the Territory of Hawaii as aforesaid, he had been duly and lawfully married according to the laws of the Empire of Japan to Masa Tsuji, and that said Masa Tsuji arrived in Honolulu aforesaid, on or about the 28th day of August, A. D. 1906, aboard the S. S. "America Maru"; and at all times since the last mentioned date to the date hereof the said Masa Tsuji has resided and had her domicile in Honolulu aforesaid.

That on or about the 26th day of September, A. D. 1910, petitioner departed from the port of Honolulu aboard the S. S. "China," bound for the Empire of Japan, to which country petitioner desired to go for a short vis*ti*, and upon leaving said port of Honolulu and at all times thereafter, petitioner intended to return to said Honolulu and to continue to reside in said Honolulu; that said petitioner, during his intended temporary absence as aforesaid, left his said wife in Honolulu aforesaid.

That petitioner returned to the port of Honolulu on or about the 17th day of June, A. D. 1911, aboard the S. S. "Korea."

That upon the arrival of petitioner at the port of Honolulu, on the date last aforesaid, and at all times since the last-mentioned date, Raymond C. Brown, Esq., United States Immigration Inspector at the said port of Honolulu, has refused a landing to your petitioner, as petitioner is informed and believes **[25]** and upon such information and beliefs alleges and avers, under the claim or pretense that your petitioner is an immigration alien and as such, a person belonging to an excluded class under the Immigration Laws of the United States; whereas in truth and in fact, your petitioner is a nonimmigrant alien and not subject to said Immigration Laws.

WHEREFORE PETITIONER PRAYS that the writ of habeas corpus heretofore issued herein be sustained and that petitioner be discharged.

Dated Honolulu, July 24th, 1911.

(Sgd.) JAPANESE CHARACTERS.
(SUEKICHI TSUJI.)

United States of America,
Territory of Hawaii,—ss.

Now comes Suekichi Tsuji, and first being duly sworn on oath deposes and says: That he is the petitioner above named; that he has read the foregoing answer and knows the contents thereof and that the same is true, except as to the matters therein alleged on information and beliefs, and as to those he believes it true.

(Sgd.) JAPANESE CHARACTERS.
(SUEKICHI TSUJI.)

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

[Seal] (Sgd.) J. B. LIGHTFOOT,
Notary Public, First Judicial Circuit, Territory of Hawaii. **[26]**

[Endorsed]: No. 42. (Title of Court and Cause.) Answer. Filed Jul. 24, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. **[27]**

[Order of Submission.]

From the Minutes of the United States District Court, Vol. 7, Page 548, Wednesday, July 26, 1911.

[Title of Court and Cause.]

On this day came the petitioner herein, Suekichi Tsuji, with his counsel, Mr. J. Lightfoot, and the respondent herein, Mr. Raymond C. Brown, United States Inspector of Immigration, with his counsel, Mr. R. W. Breckons, United States District Attor-

ney, and this cause was called for hearing on the petition herein upon motion of Mr. Lightfoot, counsel for said petitioner. Due argument having been had by respective counsel, the matter was taken under advisement by the Court for decision. [28]

[Minutes of July 29, 1911, Re Argument, Decision and Appeal.]

ORDER DISCHARGING PETITIONER FROM CUSTODY.

From the Minutes of the United States District Court, Vol. 7, Page 549, Saturday, July 29, 1911.

[Title of Court and Cause.]

On this day came Mr. J. Lightfoot, counsel for the petitioner herein, Suekichi Tsuji, and Mr. R. W. Breckons, counsel for the respondent herein, Mr. Raymond C. Brown, United States Immigration Inspector, who was present. After due argument by respective counsel, the Court rendered its decision, discharging the petitioner from the custody of the respondent herein, subject, however, to his furnishing a recognizance with surety in the sum of Five Hundred Dollars ($500.00), to answer the judgment of the appellate court. Mr. Breckons, on behalf of the respondent herein, noted an appeal to the ruling of the Court, which was allowed. [29]

[Decision.]

In the United States District Court for the Territory of Hawaii.

APRIL A. D. 1911 TERM.

No. 42.

In the Matter of the Application of SUEKICHI TSUJI for a Writ of Habeas Corpus.

July 29, 1911.

1. *Aliens—Immigration laws—Right of domiciled alien criminal to re-enter:* Domiciled aliens returning from a temporary absence abroad, are not excluded from admission to the United States by the Immigration Act (Act of Feb. 20, 1907, 34 Stat. 898, amended by Act of March 26, 1910, 36 Stat. 263), even though of the criminal class (Act, Section 2).
2. *Courts—Rules of decision—Decision of appellate court*: This court is bound, as a rule, to follow the decisions of its superior court, the Circuit Court of Appeals for the Ninth Circuit, in a similar case. United States vs. Nakashima, 160 Fed. 842 followed.
3. *Same—Decision of associate judge*: The ruling of one member of this court should be followed by his associate unless extraordinary reasons require its consideration.
4. *Statutes—Construction*: As a rule, the intent of a statute is to be ascertained solely from the language used.

Petition for Writ of Habeas Corpus.

J. LIGHTFOOT, Attorney for Petitioner.
ROBERT W. BRECKONS, U. S. District Attorney, for Respondent.

A writ of habeas corpus issued herein directed to the United States Immigration Inspector at the port of Honolulu as respondent, based upon the claim of the petitioner, Suekichi Tsuji, that he was illegally held in custody by the inspector. From the petition, the respondent's return and supplemental return, and the petitioner's answer to the returns, the following facts appear: The petitioner, a subject of the Emperor of Japan, came to Honolulu in July, 1906, and a month later was followed by his wife. Ever since arrival they have both had their residence and domicile in Honolulu, except that the petitioner was absent temporarily on a vis*ti* from September, 1910, to June, 1911, when he returned to Hawaii. In April, 1909, he was in this court indicted for the crime of harboring an alien woman, his own wife, for the purpose of prostitution, and in November, 1909, on a plea of guilty, was sentenced to three months' imprisonment, which sentence was duly executed. On his return to Honolulu he was examined by a board of special inquiry which, after due hearing, determined that he had no right to land in the United States, and ordered him deported as a person convicted of a crime involving moral turpitude.

The contentions of the petitioner are: (1) That the above indictment and all proceedings thereon including the plea of guilty, are null and void as founded on an unconstitutional [31] statute; (2)

That he is a nonimmigrant alien and not subject to the immigration laws.

The question suggested in argument, of this court's jurisdiction, or of the finality of the decision of the board of special inquiry, is not raised by the pleadings, and was by counsel practically conceded to have been settled for this court by its previous decisions and the affirmance of the Circuit Court of Appeals. *In re Chop Tin,* 2 Haw. Fed. 153; *In re Nakashima,* 3 Haw. Fed. ——; *United States vs. Nakashima,* 160 Fed. 842, 846, 847.

The question of the constitutionality of the statute under which the petitioner was indicted has, also, been settled here. *In re Shigematsu Umeno,* 3 Haw. Fed. ——, now pending on appeal to the Supreme Court. See *United States vs. Weis,* 181 Fed. 860.

It remains to be determined, whether the petitioner is within the provisions of the immigration laws,—whether these laws apply to nonimmigrant aliens.

The contention in the respondent's behalf is that the immigration laws now in force (Act of February 20, 1907, 34 Stat. 898, as amended by Act of March 26, 1910, 36 Stat. 263), and those superseded by the Act of 1907 (Act of March 3, 1903, 32 Stat. 1213) do not purport to amend previous laws, but to remodel and reconstruct the entire immigration system; that Congress had in view not only undesirable immigrants, in the narrower sense of the word, i. e., aliens coming to our country for the first time to seek residence here, but also all aliens of the undesirable classes specified in section 2 of the Act, whether coming [32] for the first time, or returning after an aban-

donment of their domicile here, or returning after a temporary absence. And it is attempted to distinguish the decision in the *Nakashima Case,* 160 Fed. 843, by the fact of that decision's being based on laws enacted prior to 1907 and not so broad as the statute of that year (34 Stat. 898). It is also argued in favor of a broad interpretation of the act as against persons convicted, or admitting the commission, of a crime of the particular character of which the petitioner has been convicted, that Congress in its deliberations over the new act of 1907, had before it especially the matters of preventing the importation of alien women for the purpose of prostitution, and of suppressing the traffic of pimps and procurers, and that diplomatic negotiations were then pending which, about the time of the passage of the act, culminated in a treaty directed against these evils; that this contemporaneous history shows Congress to have intended to prevent the coming in of all aliens of the petitioner's class.

Beyond question, the petitioner would, if a new-comer, be proscribed by section 2 of the act as amended (36 Stat. 263). Does this section apply to new-comers? Or, does it apply to all aliens whether coming here for the first time or returning from a temporary absence?

As to the respondent's reliance upon the adoption, in the act of 1903 and subsequent acts, of the broader term "alien" instead of the narrower term "immigrant" used in [33] earlier acts, the question has been settled for this jurisdiction adversely to his contention. *United States vs. Nakashima,* 160 Fed.842.

Through the Supreme Court in overruling the decision in *Taylor vs. United States,* 152 Fed. 1, in which the same question is raised, leaves the question open, 207 U. S. 120, 126, we are bound, by the general rule at least, to follow the decision of our superior court of the Ninth Circuit in the Nakashima Case. *Roche vs. Jordan,* 175 Fed. 234, 235; *Continental Securities Co. vs. Interborough R. Co.,* 165 Fed. 945, 959-960; *In re Baird,* 154 Fed. 215; *Edison Electric Light Co. vs. Bloomingdale,* 65 Fed. 212, 214; *Norton vs. Wheaton,* 57 Fed. 927–928; *Dent vs. United States,* 8 Ariz. 413, 76 Pac. 455.

Also, the present judge would, unless for very good reasons not existing here, follow the decision of his senior associate in the *Nakashima Case,* 3 Haw. Fed. ——. See *United States vs. Hoshi,* 3 Haw. Fed.——; *United States vs. Ichitaro Ishibashyi,* 3 Haw. Fed. ——.

And, at all events, in spite of some rulings to the contrary, e. g., *Taylor vs. United States,* 152 Fed. 1, *United States vs. Villet,* 173 Fed. 500, *Ex parte Hoffman,* 179 Fed. 839, *United States vs. Williams,* 186 Fed. 354, we believe the decisions in the *Nakashima Case,* 3 Haw. Fed. ——, and 160 Fed. 842, 844–845, and the reasoning of Circuit Judge Wallace, dissenting, in the *Taylor Case,* 152 Fed. 1, 7–8, to be sound. The contra decisions seem not to give due, if any, attention to the parol evidence rule as applied to the interpretation of statutes. See 4 Wigmore, Ev., sec. 2478; 2 Lewis' Sutherland on Statutory Construction, 882–883, sec. 470; *United States vs. Freight Assn.,* 166 U. S. 290, 318–319; [34] *United States*

vs. Union Pacific R. Co., 91 U. S. 72, 79; *United States vs. Oregon & C. R. Co.,* 57 Fed. 426, 429; *Keyport Steamboat Co. vs. Farmers' Transportation Co.,* 18 N. J. Eq. 13, 24.

Further, it is no violent supposition that the lawmakers had in mind what everyone is presumed to know,—the law as declared by the courts. And, in the face of contemporaneous decisions such as those of *Rogers vs. United States,* 152 Fed. 346; s. c. (*In re Buchsbaum*) 141 Fed. 221; *United States vs. Aultman,* 143 Fed. 922, and even of the contra decision in *Taylor vs. United States,* 152 Fed. 1, wherein doubt was raised by a strong dissent, it would seem that Congress, if intending so radical a change, would, and should, have placed beyond any question the expression of its intent. *In re Nakashima,* 3 Haw. Fed. ——; *United States vs. Aultman,* 143 Fed. 922, 928. And legislatures should not be encouraged in putting the people, who are presumed to know law, to the necessity of looking for the intent of a statute beyond its face. 18 N. J. Eq., 13, 24, above cited.

The petitioner is discharged subject to the taking of an appeal, in which case he may be released upon giving a recognizance with surety in an amount to be fixed by the court to answer the judgment of the appellate court.

[Sgd.] CHAS. F. CLEMONS,
Judge, U. S. District Court.

[Endorsed]: No. 42. (Title of Court and Cause.) Decision of Clemons, J. Filed. Saturday, July 29, 1911. A. E. Murphy, Clerk. By (Sgd.) Geo. R. Clark, Deputy Clerk. [35]

In the District Court of the United States, in and for the Territory and District of Hawaii.

In the Matter of the Application of TSUJI SUEKICHI, for a Writ of Habeas Corpus.

Judgment.

At the regular April, A. D. 1911 term of the District Court of the United States for the District and Territory of Hawaii, held in the Courtroom of said Court, in the City of Honolulu, District and Territory aforesaid, on Saturday, the 29th day of July, A. D. 1911, the above-entitled Cause having heretofore been heard on the pleadings and arguments by counsel for the respective parties and due deliberation had thereon, the Court finds that the above-entitled petitioner, Tsuji Suekichi, is entitled to be discharged, subject to the taking of an appeal, in which case he may be released upon giving a recognizance with sureties in the sum of Five Hundred Dollars ($500.00) to answer the judgment of the Appellate Court.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-named petitioner, Tsuji Suekichi, be and he is hereby discharged from custody herein subject to the taking of an appeal.

And the Court being advised that the above-entitled action will be removed to the Appellate Court by proper proceedings to be had in that behalf.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the above-named

petitioner, Tsuji Suekichi, give his recognizance with surety, in the sum and amount of Five [36] Hundred Dollars ($500.00), to answer the judgment of the appellate Court, and that upon the giving of such recognizance the said petitioner, Tsuji Suekichi, be released from custody.

GIVEN, MADE AND DATED at Honolulu, Hawaii, this 31st day of July, A. D. 1911.

(Sgd.) CHAS. F. CLEMONS,
Judge.

[Endorsed]: No. 42. (Title of Court and Cause.) Judgment. Entered in J. & D. Book 2, at page 235. Filed, Jul. 31, 1911. (Sgd.) A. E. Murphy, Clerk. [37]

[Order Directing Amendment of Recognizance, etc.]

From the Minutes of the United States District Court, Vol. 7, Page 564, Saturday, August 5, 1911.

[Title of Court and Cause.]

On this day came Mr. W. T. Rawlins, Assistant District Attorney, counsel for the respondent herein, Mr. Raymond C. Brown, United States Inspector of Immigration, said petitioner, his counsel, Mr. J. Lightfoot, and the respondent herein being absent. Upon motion of Mr. Rawlins that the form of the recognizance heretofore filed herein in the sum of $500.00 by the petitioner covering an appeal to the Supreme Court be amended to cover an appeal to the Ninth Circuit Court of Appeals, it was so ordered by the Court and the Clerk was instructed by the Court to notify Mr. J. Lightfoot, counsel for said petitioner, to file an amended recognizance. [38]

[Order Granting Petition for Appeal, etc.]

From the Minutes of the United States District Court, Vol. 7, Page 569, Monday, August 7, 1911.

[Title of Court and Cause.]

On this day came Mr. W. T. Rawlins, Assistant District Attorney, counsel for the respondent herein, Mr. Raymond C. Brown, Inspector in Charge of the Immigration Service of the United States, who presented to the Court a Petition for Appeal herein, and thereupon the Court made the following order, viz: Upon application and motion of R. W. Breckons, United States Attorney for the Territory of Hawaii: It is Hereby Ordered that the petition for appeal heretofore filed herein by the United States of America be, and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment heretofore, on July 31st, 1911, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which said final order and judgment is made, duly certified and authenticated, be transmitted, under the hand and seal of the Clerk of this Court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California." **[39]**

In the United States District Court for the Territory of Hawaii.

No. ——.

In the Matter of the Application of TSUJI SUEKICHI, for a Writ of Habeas Corpus.

Recognizance.

The United States of America,
Territory and District of Hawaii,—ss.

Be it remembered, that on the 31st day of July, A. D. 1911, before me, A. E. Murphy, Clerk of the District Court of the United States within and for the Territory and District of Hawaii, duly appointed by said Court and duly qualified and acting as such Clerk, personally came Tsuji Suekichi, as principal, and M. Yamashiro and M. Mamiya, as sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of Five Hundred Dollars ($500.00), to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

THE CONDITION OF THIS RECOGNIZANCE is such, that whereas, by the judgment of the above-entitled court in the above-entitled action dated July 31, 1911, the above-named Tsuji Suekichi was ordered discharged from custody, subject to the taking of an appeal; and,

WHEREAS, said Court, being advised that the above-entitled action will be removed to the Appellate Court by proper proceedings in that behalf, further ordered that said Tsuji Suekichi give his

recognizance with surety in the sum and amount of Five Hundred Dollars ($500.00) to answer the judgment of the Appellate Court, and that, upon the giving [40] of such recognizance, said Tsuji Suekichi shall answer, abide by and render himself in execution of, and obey, all orders and judgment of the A*pe*llate Court herein, whether that Appellate Court be the United States Circuit Court of Appeals for the Ninth Circuit or the Supreme Court of the United States, and in all respects subject himself to whatever action may be taken in or by such Appellate Court, then this recognizance to be void; otherwise to remain in full force, virtue and effect.

(Sgd.) JAPANESE CHARACTERS.
(TSUJI SUEKICHI),
Principal.

(Sgd.) M. YAMASHIRO,
Surety.

(Sgd.) H. MAMIYA,
Surety.

Taken and acknowledged before me the day and year first above written.

[Seal] A. E. MURPHY,
Clerk, U. S. District Court, T. of H.
By (Sgd.) Geo. R. Clark,
Deputy Clerk.

United States of America,
Terr*o*tory and District of Hawaii,—ss.

M. Yamashiro and M. Mamiya, parties to the above bond, being duly sworn, do depose and say, each for himself, that he is worth the sum of Five Hundred Dollars ($500.00), over and above his just

debts, liabilities and exemptions, and that his property is situate in said Territory and subject to execution.

(Sgd.) M. YAMASHIRO.
(Sgd.) H. MAMIYA.

Subscribed in my presence and sworn to before me this 8th day of August, 1911.

[Seal] A. E. MURPHY,
Clerk, U. S. District Court, Territory of Hawaii.
By (Sgd.) Geo. R. Clark,
Deputy Clerk.

Approved as to form and as to sufficiency of sureties.

_____,
U. S. District Attorney.

Approved:
(Sgd.) CHAS. F. CLEMONS, Judge. [41]

[Endorsed]: No. 42. (Title of Court and Cause.) Amended Recognizance. Filed Aug. 8, 1911. A. E. Murphy, Clerk. By (Sgd.) Geo. R. Clark, Deputy Clerk. [42]

In the United States District Court for the Territory of Hawaii.

April A. D. 1911 Term.

No. 42.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Petition for Appeal.

To the Honorable CHARLES F. CLEMONS, Judge of the Above-entitled Court.

The United States of America, by its attorney,

Robert W. Breckons, conceiving itself aggrieved by the order and judgment made and entered on the 31st day of July, A. D. 1911, in the above-entitled proceeding, does hereby appeal from the said order and judgment to the Circuit Court of Appeals for the Ninth Circuit, and files herwith its assignment of errors intended to be urged upon appeal, and it prays that its appeal may be allowed, and that a transcript of the record of all proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Circuit Court of Appeals of the Ninth Judicial Circuit of the United States.

Dated this 7th day of August, A. D. 1911.

(Sgd.) ROBT. W. BRECKONS,
United States Attorney.

Received a copy of the above petition.

TSUJI SUEKICHI,
By His Attorney.
(Sgd.) J. LIGHTFOOT. [43]

[Endorsed]: No. 42. (Title of Court and Cause.) Petition for Appeal. Filed Aug. 7, 1911. A. E. Murphy, Clerk. By (Sgd.) Geo. R. Clark, Deputy Clerk. [44]

In the United States District Court for the Territory of Hawaii.

April A. D. 1911 Term.

No. 42.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Assignment of Errors.

And now comes the United States of America, by Robert W. Breckons, its attorney, and says that in the record and proceedings in the above-entitled matter there is a manifest error, and that the final order and judgment, made and entered in said matter on the 31st day of July, A. D. 1911, is erroneous and against the just rights of said United States, in this, to wit:

First. The above-entitled Court erred in granting the application for the Writ of Habeas Corpus herein.

Second. The Court erred in holding that the provisions of the Act of Congress of February 20, A. D. 1907, "to regulate the immigration of aliens into the United States," as amended by the Act of March 26, A. D. 1910, applied to alien immigrants, but not to aliens domiciled in the United States who may have temporarily gone abroad and are returning thereto. [45]

Third. The Court erred in holding that it could interfere with the decision of the appropriate Immigration officer adverse to the right of an alien to enter the United States.

Fourth. The Court erred in not holding that the aforesaid Act of February 20, A. D. 1907, as amended by the Act of March 26, A. D. 1910, applied to the immigration of aliens into the United States.

Fifth. The Court erred in holding that the above-named applicant should be discharged.

Sixth. The Court erred in refusing to grant the above-named applicant the relief prayed for by him herein.

Seventh. The Court erred in making and entering the final order and judgment of July 31, A. D. 1911, in favor of said applicant and against the United States, upon the pleadings and record in the above-entitled matter.

Eighth. The Court erred in making, rendering and entering said final order and judgment of July 31, A. D. 1911, in this, that said final order and judgment was and is contrary to law, and to the facts stated in the pleadings and record in the above-entitled matter.

Ninth. The Court erred in other particulars appearing upon the record.

Whereas, by the law of the land, the said application for a writ of habeas corpus should have been denied, and the said writ of habeas corpus should have been discharged, and the said applicant and petitioner should have been remanded to be dealt with according to law: [46]

And the aforesaid United States of America now prays that the order and judgment of July 31, A. D. 1911, hereinabove mentioned may be reversed, annulled, and held for naught, and that it, said United

States, may have such other and further relief as may be proper in the premises.

Dated this 7th day of August, A. D. 1911.

(Sgd.) ROBT. W. BRECKONS,
United States Attorney.

Received a copy of the above assignment of errors.

By (Sgd.) J. LIGHTFOOT,
His Attorney.

[Endorsed]: No. 42. (Title of Court and Cause.) Assignment of Errors. Filed Aug. 7, 1911. A. E. Murphy, Clerk. By (Sgd.) Geo. R. Clark, Deputy Clerk. [47]

In the United States District Court for the Territory of Hawaii.

April A. D. 1911 Term.

No. 42.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Order Allowing Appeal, etc.

Upon application and motion of R. W. Breckons, United States Attorney for the Territory of Hawaii:

IT IS HEREBY ORDERED that the petition for appeal heretofore filed herein by the United States of America, be, and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment heretofore, on July 31st, 1911, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all pro-

ceedings and papers upon which said final order and judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the Clerk of this Court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California, dated this 7th day of August, A. D. 1911.

(Sgd.) CHAS. F. CLEMONS,
Judge U. S. District Court, District of Hawaii.

Received a copy of the above order.

TSUJI SUEKICHI,
By (Sgd.) J. LIGHTFOOT,
His Attorney. [48]

[Endorsed]: No. 42. (Title of Court and Cause.) Order Allowing Appeal. Filed Aug. 7, 1911. A. E. Murphy, Clerk. By (Sgd.) Geo. R. Clark, Deputy Clerk. [49]

In the United States District Court for the Territory of Hawaii.

April, A. D. 1911 Term.

No. 42.

In the Matter of the Application of TSUJI SUEKICHI, for a Writ of Habeas Corpus.

Citation on Appeal [Original].

United States of America,—ss.

The President of the United States, to Tsuji Suekichi, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals

for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within forty-five days from the date of this writ, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States District Court for the Territory of Hawaii, wherein the United States of America is appellant, and you, Tsuji Suekichi, are appellee, to show cause if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf. [50]

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 7th day of August, A. D. 1911, and of the Independence of the United States the one hundred and thirty-sixth.

CHAS. F. CLEMONS,
Judge U. S. District Court, District of Hawaii.

[Seal] Attest: A. E. MURPHY,
Clerk U. S. District Court.

Received a copy of within citation.

By J. LIGHTFOOT,
His Attorney.

[Endorsed]: No. 42. (Title of Court and Cause.) Citation on Appeal. Filed Aug. 7, 1911. A. E. Murphy, Clerk. By (Sgd.) Geo. R. Clark, Deputy Clerk. [51]

In the United States District Court for the Territory of Hawaii.

April A. D. 1911 Term.

No. 42.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition for writ of habeas corpus; filed July 3, 1911.
2. Writ of habeas corpus, and return of service; filed July 6, 1911.
3. Return of R. C. Brown to writ of habeas corpus; filed July 18, 1911.
4. Supplemental return of R. C. Brown to writ of habeas corpus; filed July 19, 1911.
5. Answer to return; filed July 24, 1911.
6. Decision; filed July 31, 1911. [52]
7. Judgment; filed July 31, 1911.
8. Recognizance; filed Aug. 8, 1911.
9. Petition for Appeal; filed August 7, 1911.
10. Assignment of Errors; filed August 7, 1911.
11. Order allowing Appeal; filed August 7, 1911.
12. Citation; filed August 7, 1911.

13. All minute entries in above-entitled cause.
14. This Praecipe.

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of said Circuit Court of Appeals at San Francisco, before the twenty-second of September, A. D. 1911.

Dated Honolulu, Hawaii, August 7th, A. D. 1911.

THE UNITED STATES OF AMERICA,
By (Sgd.) ROBT. W. BRECKONS,
United States Attorney.

[Endorsed]: No. 42. (Title of Court and Cause.) Praecipe for Transcript. Filed, Aug. 7, 1911. A. E. Murphy, Clerk. By (Sgd.) Geo. R. Clark, Deputy Clerk. [53]

[Certificate of Clerk U. S. District Court to Record.]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 42.

In the Matter of the Application of SUEKICHI TSUJI, for a Writ of Habeas Corpus.

United States of America,
Territory of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 54, inclusive, is a true and complete transcript of the record and proceedings had in said court in the matter of the Application of Suekichi Tsuji for a

writ of habeas corpus, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal in said cause.

I further certify that the cost of the foregoing tr*na*script of record is $12.95, and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court on this 11th day of September, A. D. 1911.

[Seal] A. E. MURPHY,
Clerk, United States District Court, Territory of Hawaii. [54]

[Endorsed]: No. 2044. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Tsuji Suekichi, Appellee. In the Matter of the Application of Tsuji Suekichi for a Writ of Habeas Corpus. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed September 19, 1911.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2044.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

APPELLANT,

vs.

TSUJI SUEKICHI,

APPELLEE.

In the Matter of the Application of Tsuji Suekichi For a Writ of Habeas Corpus.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

ROBERT W. BRECKONS,
United States Attorney for the Territory of Hawaii.

ROBERT T. DEVLIN,
United States Attorney for the Northern District of California,

BENJAMIN L. McKINLEY,
Assistant United States Attorney for the Northern District of California,

ATTORNEYS FOR APPELLANT.

No. 2044.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TSUJI SUEKICHI,
Appellee.

IN THE MATTER OF THE APPLICATION OF TSUJI SUEKICHI FOR A WRIT OF HABEAS CORPUS.

BRIEF OF APPELLANT.

Upon Appeal from the United States District Court for the Territory of Hawaii.

STATEMENT OF THE CASE.

The facts herein involved are comparatively few and simple. The District Court of Hawaii evidently determined the case upon the pleadings, and from the pleadings themselves we may fairly gather the facts. They are as follows:

Tsuji Suekichi, a subject of the Empire of Japan, arrived in the United States at the port of Honolulu, on July 27, 1906, and was duly admitted as an alien immigrant.

On September 26, 1910, he left the port of Honolulu for the Empire of Japan, intending, according to his own statement, to return to Honolulu. He arrived at Honolulu again on June 17, 1911, and upon a hearing before a Board of Special Inquiry, duly and regularly convened, was denied admission, and ordered deported. He waived his right of appeal in writing, and instituted *habeas corpus* proceedings. While in the United States, and in the year 1909, he was indicted and convicted of a violation of the provisions of Section 3 of the Act of February 20, 1907, the charge being that he did keep, maintain, control, support and harbor, for the purpose of prostitution, a woman named Masuyo Tsuji, that woman being his wife, and the woman with whom he came to the Territory, and whom he was returning to join. The record appears to be silent, save by inference, as to the occupation of the woman at the time the petitioner for the writ returned to Honolulu. She was practicing prostitution when he left, and further than that the record is silent. Tsuji Suekichi was rejected on the ground that he had been convicted of a crime involving moral turpitude.

ARGUMENT AND BRIEF.

The legal questions involved are few and definite. Taking them up in their natural order, we shall first consider the one relating to the jurisdiction of the court.

The decision of the Board of Special Inquiry, affirmed on appeal, or not appealed from, is, according to the terms of the immigration laws, final. As to this provision, however, and particularly as to its applicability to cases where the alien affected is a returning alien, some very considerable difference exists in the several decisions of the courts. The trend of recent authority seems to be in the direction of upholding the jurisdiction of the court, although there are some very well considered cases to the contrary.

So far as this court is concerned, the matter seems to us to have been definitely settled by the decision in the *Nakashima Case,* 160 Federal, 842. In that case a returning immigrant, suffering with trachoma, was denied admission, but that denial was held to be wrong by this court. It is true that in its opinion the court, in discussing the finality of the decision of the Board of Special Inquiry, held that one question involved in the decision was as to the residence and intention of the alien. The court said:

> "While the statute declares that the decisions of the Board shall be final, it allows an appeal and provides that the decision on appeal shall be final. In the present case the dismissal of the appeal was a denial of the right of appeal to the appellee herein. That right having been denied, we find in the record no final decision. If the Secretary of Commerce had entertained the appeal, and had affirmed the decision of the Board, a different question would be presented."

Nevertheless, some of the authorities relied upon for sustaining the proposition that the Immigration Act did

not cover returning aliens, clearly uphold the jurisdiction of the court.

In *In re Buchsbaum,* 141 Federal, 221, the allegation of the petitioner that he was not given a lawful opportunity to appeal, appears to have been swept aside by District Judge McPherson as wholly immaterial. In the earlier cases cited the jurisdiction of the court was upheld without any reference to a denial of the right to appeal. Indeed, in the *Nakashima Case* itself the record will show in the lower court that the question of the denial of the right of appeal was not considered as affecting the case. For these reasons, therefore, we are inclined to believe that the *Nakashima Case* was decisive on the question of jurisdiction.

Assuming, however, that it was not intended to be decisive, then the question would be simply as to whether or not the appellee in this case had been accorded a reasonable hearing on the question of his right to land in the United States. So far as the record in this respect is concerned, it is clear that such a hearing was accorded Tsuji Suekichi, and that he was notified of his right of appeal, and waived that right.

Under these conditions, a review of the law on the subject of jurisdiction may perhaps become necessary, and we shall refer briefly to some of the cases on the subject.

In re Martorelli, 63 Federal, 437, Circuit Judge Lacombe held that the Immigration Act of 1891 did not refer to returning aliens. Jurisdiction was entertained without comment, the only authority referred to is the *Panzara*

Case, 51 Federal, 275. In the *Panzara Case* District Judge Benedict entertained jurisdiction and discharged an alien held for deportation. In the opinion it is said that the case was one outside of the jurisdiction of the superintendent of immigration, and that he had no authority whatever to act.

In re Maiola, 67 Federal, 114, was a case in which Judge Lacombe again held that a returning immigrant was not within the laws then in existence. In this case, however, he went more fully into the question of jurisdiction, and held that the courts might exercise jurisdiction on *habeas corpus,* notwithstanding the fact that the immigration law made the decision of the executive officers final. This case, as well as the two preceding ones, was of course decided under the immigration law of 1891.

In the case *In re Monaco,* 86 Federal, 117, Judge Lacombe appeared to be somewhat in doubt as to what should be done. It was a case where returning immigrants had been ordered deported because the physician reported them to be suffering from a loathsome, contagious disease. It seems that later the physician modified his diagnosis. The opinion concludes as follows:

> "Under these circumstances, the decision of the board cannot be accepted as final, and the case is sent to the clerk of the court, to take testimony and report the facts bearing on the questions: (1) Whether petitioners are immigrants; (2) whether they, or any of them, are suffering from a loathsome, contagious disease."

In re Ota, 96 Federal, 487, arose in the District Court, N. D. California, and was decided by Judge De Haven.

It was likewise a case of a returning alien suffering from a loathsome, contagious disease. Dealing with the question of jurisdiction, Judge De Haven held that the decision was final and that the courts could not interfere. The opinion does not deal with the question of appeal. Perhaps this was because of the fact that the Act of 1891 did not, as does the Act of 1907, provide that there shall be no appeal where rejection is ordered on account of aliens suffering from a loathsome or contagious disease.

In re Di Simone, 108 Federal, 942, decided March 2, 1901, by Judge Boarman, of the Eastern District of Louisiana, is more entertaining and exhaustive than instructive.

One is not surprised at the footnote to the case, which reads: "Reversed on confession of error."

Moffitt vs. *United States,* 128 Federal, 375, was decided by this court. It was a criminal case against the master of a steamship, based upon a violation of the immigration Act of 1891. The case is interesting only from the fact that who is an alien immigrant is defined. It more nearly corresponds with the *Taylor Case* in the Supreme Court of the United States, than with the case at bar.

In re Kleibs, 128 Federal, 656, is a case which is difficult to understand, in view of the former rulings made by Circuit Judge Lacombe. It was the case of a returning immigrant who, when he left the United States, had bought a farm and taken out his first papers. Perhaps there was nothing in the record to show that when he left the United States he had any intention of returning.

In re Buchsbaum, 141 Federal, 221, decided in 1905. This case arose under the Immigration Act of 1903. The immigrant was rejected on the ground that he was afflicted with trachoma. In his petition for the writ of *habeas corpus* he set forth, amongst other things, that he was not given a lawful opportunity to appeal by the Commissioner of Immigration. He was ordered discharged without any reference whatever to the fact that he alleged he had been deprived of his right to appeal. The *Panzara, Martorelli* and *Maiola* cases are given as authority for the action of the court. The question of jurisdiction is not discussed, nor is any reference made as to the finality of the decision of the executive officers. The Act of 1903, like the Act of 1907, provides that the decision of the Board of Special Inquiry, based upon the certificate of the examining medical officer, shall be final. (See Sec. 10, Immigration Act of March 3, 1903; 32 Stats. at Large, Part I, page 1216.)

United States vs. *Aultman Co.,* 143 Federal, 922, is an interesting case. District Judge Taylor of the Northern District of Ohio, reviews the various immigration laws at length. It was a suit brought under the Act of 1903, against a concern for importing contract laborers. The laborer had gone into Canada for two weeks from the United States, and returned under contract. The Judge, in directing a verdict in favor of the defendant, held that within the meaning of the Act of 1903, the alien was not an alien immigrant.

The case of *Rodgers* vs. *United States,* reported in 152 Federal, 346, arose on an appeal by the government in

the *Buchsbaum Case,* and was decided by the Circuit Court of Appeals of the Third Circuit. Again was it held that the court might entertain jurisdiction in the event of denial upon appeal, and again was it held that a returning alien was not an alien immigrant within the meaning of the Act of 1903. The various authorities are quite fully reviewed.

Taylor vs. *United States,* reported in 152 Federal, 1, decided by the Circuit Court of Appeals of the Second Circuit, just about a month prior to the *Rodgers* decision, held that a returning alien was an alien immigrant. The opinion contains an exhaustive review of the act itself, and of the Congressional debates attendant upon its passage. The case is important, since an appeal was taken to the Supreme Court of the United States. While the decision was reversed, it was on a point other than the construction of the word "alien."

Taylor vs. *United States,* 207 U. S., 130. This was an appeal to the Supreme Court of the United States in the last mentioned case. On the ground that a deserting sailor is not an alien within the meaning of the Immigration Act of 1903, the lower court was reversed. Touching the construction placed by the lower court on the Act, the Supreme Court says:

> "A reason for the construction adopted below was found in the omission of the word 'immigrant' which had followed 'alien' in the earlier acts. *No doubt that may have been intended to widen the reach of the statute,* but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come

> here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is 'An Act to Regulate the Immigration of Aliens into the United States.' ''

In the very well considered case of *Ex parte Peterson,* 166 Federal, 538, District Judge Purdy treats the language of the Supreme Court in the *Taylor* case as being "especially" significant. He also deals with the *Nakashima Case,* and the various other authorities.

In *United States* vs. *Watchorn,* 164 Federal, 152, Circuit Judge Ward of the Southern District of New York refused to take jurisdiction in the case of a returning alien under the Act of 1907. He mentions the *Nakashima* case, and says that if an appeal had been allowed, and the Secretary had affirmed the action of the Board, the Court would have considered such decision as final. He refused to take jurisdiction, holding the decision of the immigration authorities to be final.

In *Ex parte Crawford,* 165 Federal, 832, District Judge Adams followed the ruling of Circuit Judge Ward in the case last cited.

In *Sprung* vs. *Morton,* 182 Federal, 330, District Judge Waddill of the Eastern District of Virginia, held that where an alien has once lawfully entered the United States, the re-entry after a temporary absence does not make her subject to deportation. In arriving at the conclusion, the learned judge relied on the various cases cited above, and on the reasoning therein employed. This case was decided on December 31, 1909. The decision was reversed later.

United States vs. *Sprung,* 187 Federal, 903, this being an appeal from the case last referred to, was decided by the Circuit Court of Appeals of the Fourth Circuit. It followed the rulings of the Circuit Court of Appeals of the Second Circuit, and reversed the lower court.

In *Ex parte Hoffman,* 179 Federal, 840, the Circuit Court of Appeals again held that the word "alien" was broader than the words "alien immigrant."

The latest decision on the subject which can be found by us, has apparently not yet been reported. It is the case of *Percy L. Prentis, Immigrant Inspector,* vs. *Petros Stathakos,* and was an appeal by the government from the holding of the District Court of the United States for the Northern District of Illinois, to the Circuit Court of Appeals for that Circuit. The immigrant had lived in the United States for ten or fifteen years, and acquired property. He returned temporarily to Greece. When he came back it had been discovered that prior to his first coming to the United States he had been guilty of a crime in Greece. The Court in conclusion said:

> "Unfortunately for him, he returned to Greece, and thereby, by coming back, laid the foundation for his deportation, notwithstanding his long residence and good record. These circumstances undoubtedly lay the foundation for the exercise of a broader discretion in cases like this than the mere plain enforcement of the act. But whatever discretion shall be exercised is for the Secretary of Commerce and Labor, and not for the courts."

From the above review of the authorities it will be seen that at least three Circuit Courts of Appeal hold

that a returning alien is within the purview of the immigration statutes now in force, and that even though a hearing be denied him, yet on *habeas corpus,* if it appear that he is disqualified from entry, the writ will be dismissed. The Circuit Courts of Appeal of two other Circuits appear to hold the contrary. The Supreme Court of the United States by its language appears to hold the views of the three circuits.

Independent of questions of jurisdiction, and ordinary questions of returning immigrants, the government in this particular case contends that SUEKICHI is not entitled to land in the United States. As has been stated above, no question of the fairness of his hearing is involved, since he waived that right. (See record, p. 17.)

The record clearly shows that SUEKICHI was convicted of the crime of harboring an alien woman for immoral purposes. (See record, pp. 15-16-20.)

By reason of the decision of the Supreme Court of the United States in the *Keller Case* (213 U. S., 138), certain amendments became necessary to the Immigration Act in so far as it dealt with the question of prostitutes and importers of alien women. In making the necessary amendments Congress in 1910 passed quite a comprehensive Act. (36 Stats. at Large, Part I, p. 263.)

As amended Section 2 of the Immigration Act excluded persons supported by or receiving in whole or in part the proceeds of prostitution; and persons procuring or attempting to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral pur-

pose. Section 3 was amended in such a manner as to provide that any alien who might receive, share in, or derive benefit from any part of the earnings of any prostitute; or who might be employed by, in, or in connection with any house of prostitution, or music or dance hall, or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who might in any way assist, protect, or promise to protect from arrest any prostitute, should be deported in a given manner. The amendment further provides that any attempt on the part of any alien debarred or deported in pursuance of the provisions of the section, to return to the United States, should be deemed guilty of a misdemeanor, and upon conviction under any of the provisions of the section, the alien should, upon the expiration of the sentence, be deported to the country whence he came.

It follows from these amendments that at the time of the arrival of SUEKICHI in the United States, the law provided that an alien who had been debarred or deported because he received, shared in, or derived benefit from any part of the earnings of any prostitute; or because he was employed by or in connection with any house of prostitution, or music or dance hall, or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gathered; or because he had in any way assisted, protected, or promised to protect from arrest any prostitute, could not be permitted to land. The law as amended also punished an alien for an attempt to return to the United States, if he had before been debarred or deported for the above reasons.

SUEKICHI went back to Japan in September, 1910, (record, p. 14) subsequent to the passage of this amendatory Act. He had been released from jail seven months at that time (record, p. 16). After his release from jail he cohabited with his wife (record, p. 16). At the time of his return to Japan she was practicing prostitution (record, p. 16).

It, therefore, follows that at the time SUEKICHI went to Japan voluntarily, he was in fact subject to deportation under the terms of the Act, since he was clearly countenancing the practice of prostitution by his wife, and necessarily must have been frequenting places where prostitutes gathered. The provisions of the Act of March 26, 1910, have been held to cover the cases of aliens who were in the United States at the time of its passage, and indeed, to cover the cases of aliens in the United States without respect to the time of their arrival in the United States.

U. S. vs. *Weis,* 181 Fed., 860;
U. S. vs. *Williams,* 183 Fed., 904;
U. S. vs. *S. S. Co.,* 185 Fed., 158;
Sire vs. *Berkeshire,* 185 Fed., 971.

Had SUEKICHI been deported under a warrant of the Secretary of Commerce and Labor, as he might have been under the law of 1910, not only could he not have returned to the United States when he did, but had he attempted to do so, could have been imprisoned for two years, and would then have been deported.

Inasmuch as Congress by the Act of 1910 provided that resident aliens practicing the things of which SUEKICHI

had been found guilty, were subject to the provisions of the law, it is respectfully submitted that an intention on the part of Congress to apply those parts of the law dealing with procurers, prostitutes, etc., to returning aliens as well as to aliens coming here for the first time, clearly appears.

It is true, indeed, that the Board of Special Inquiry rejected SUEKICHI on the ground that he had been convicted of a crime involving moral turpitude, and apparently not because at the time he left for Japan he was engaged in practices which would have authorized his deportation. However, the inquiries made of the immigrant, and particularly those relative to his actions after the conclusion of his sentence and before his departure, show that the Board was endeavoring to ascertain whether SUEKICHI was amongst the excluded classes, and that their refusal to permit him to land was based on the broad proposition that he had been and was at the time of his departure a procurer, and that his conviction had not reformed him.

Counsel for the government is not unmindful of the fact that the Supreme Court of the United States, in the *Keller* case, held that the statute under which SUEKICHI was convicted was unconstitutional. It will be noted, however, that the *Keller* case dealt with the unconstitutionality of the law within one of the states, and not within a territory. The decision turned upon the single question of whether Congress had "power to punish the offense charged, or is jurisdiction thereof solely with the state?" Not one word of the reasoning would apply were

the question to arise within the Territory of Hawaii. Over the Territory Congress has supreme power. It is not a question of conflicting jurisdiction, since Congress has absolute and unqualified powers, subject of course to the Constitution, within the Territory.

Even were it to be held that the *Keller* case did not apply to a territory, yet again does the fact remain that the decision of the Board of Special Inquiry was based to some extent on the actions of SUEKICHI subsequent to the expiration of his sentence. Indeed, according to SUEKICHI, he believed his wife was still practicing prostitution (record, p. 16), since he said, "I am going to put a stop to that business."

For the reasons above, it is respectfully submitted that the judgment of the District Court of Hawaii should be reversed, and the writ of *habeas corpus* ordered dismissed.

ROBERT W. BRECKONS,
United States Attorney;

ROBERT T. DEVLIN,
United States Attorney;

BENJAMIN L. McKINLEY,
Assistant United States Attorney,

Attorneys for Appellant.

No. 2044

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant.

vs.

TSUJI SUEKICHI,

Appellee.

In the Matter of the Application of TSUJI SUEKICHI for a Writ of Habeas Corpus.

Brief of Appellee Tsuji Suekichi

Upon Appeal from the United States District Court for the Territory of Hawaii

Paradise of the Pacific Print, Honolulu

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, Appellant.
vs.
TSUJI SUEKICHI, Appellee.

Appeal from the District Court of the United States for the Territory of Hawaii.

Brief of Appellee Tsuji Suekichi

STATEMENT OF THE CASE.

This is an appeal from a judgment entered in the District Court of the United States in and for the District and Territory of Hawaii on July 31st, 1911, in the matter of the Application of Tsuji Suekichi for a writ of Habeas Corpus, discharging the petitioner from custody subject to the taking of an appeal.

The undisputed facts of the case are as follows:

The petitioner, Tsuji Suekichi, is a subject of the Emperor of Japan; that on or about the 27th day of July, 1906, petitioner arrived in Honolulu, Oahu, aboard the S. S. "Manchuria," he having embarked on said steamship in Japan; and thereupon petitioner was duly admitted to the Territory of Hawaii, and since the last mentioned date has had his domicil in Honolulu; that prior to the arrival of petitioner in the Territory of Hawaii, he had been lawfully married according to the laws of the

Empire of Japan to Masa Tsuji, and that said Masa Tsuji arrived in Honolulu on or about the 28th day of August, 1906, aboard the S. S. "America Maru"; and that at all times since last mentioned date, the said Masa Tsuji has resided and had her domicil in Honolulu; that on or about the 26th day of September, 1910, petitioner departed from the port of Honolulu aboard the S. S. "China", bound for the Empire of Japan to which country petitioner desired to go for a short visit, and upon leaving said port of Honolulu and at all times thereafter, petitioner intended to return to said Honolulu and to continue to reside in said Honolulu; that said petitioner, during his intended temporary absence as aforesaid, left his said wife in Honolulu; that petitioner returned to the port of Honolulu on or about the 17th day of June, 1911, aboard the S. S. "Korea"; that upon the arrival of the petitioner at the port of Honolulu, on the date last aforesaid, Raymond C. Brown, Esq., United States Immigration Inspector at said port of Honolulu refused landing to petitioner under the claim that petitioner is an alien immigrant and as such, a person belonging to an excluded class under the Immigration Laws of the United States.

After a hearing before the Honorable Charles F. Clemons, Judge of said District Court, a decision and judgment were duly entered, from which judgment this appeal is taken.

ARGUMENT.

The Assignment of Errors shows that the questions therein presented may be divided into two classes;

First:—Letting it be granted that the facts alleged in the petition and in the return are true, have the Federal Courts jurisdiction to grant relief in Habeas Corpus proceedings, especially in view of the fact that a hearing of the cause was had before the Board of Special Inquiry and no appeal has been taken from the findings of said Board?

Second:—Does the admitted fact that the petitioner retained his domicil in the Territory of Hawaii at all times from the date of his arrival in 1906 *to the date of his second arrival,*

place him in the category of a non-immigrant alien, and as such, not amenable to the provisions of the Immigration Act of February 20th, 1907, 34 *Stat.* 898, *as amended by the Act of March 26th,* 1910; *and as such non-immigrant alien had he the right to land in the United States, even though he may come within the class of criminals as defined in Section 2 of this Act?*

FIRST, AS TO JURISDICTION.

We submit that an examination of the authorities demonstrates clearly the proposition that:

When the facts alleged, both by the petitioner and by the respondent, are admitted to be true, the Court will, on Habeas Corpus, determine the questions, (a) whether the immigration authorties in view of the admitted facts, have power to detain the applicant, and order him deported, and (b) whether the facts admitted require, as a matter of law, that the applicant be allowed to land.

It seems to us that this question is decided once and for all in the case of *Nichimura Ekiu* vs. *United States,* 142 U. S., 651, 35 L. Ed., 1146; where the Court say:

"An alien immigrant, prevented from landing by such (Im-"migration) officers claiming to do so under an Act of Congress, "and thereby restrained of his liberty. is doubtless, entitled to "a Writ of Habeas Corpus to ascertain whether the restraint is "lawful". This case has been cited a great number of times and has never been reversed or modified.

In *Ex Parte Petterson,* 166 Fed. 536, Petterson, who had not acquired a domicil in the United States, was ordered deported by the Immigration authorities on the ground that she was a prostitute. A Writ of Habeas Corpus issued which was ultimately discharged, but the Court held that when the evidence before the Immigration Officer is uncontradicted, and establishes as a matter of law, that the case is not within the Statute, the matter may be considered by the Court on Habeas Corpus.

In *United States* vs. *Nakashima,* 160 Fed. 843, a case origi-

nating in the District Court of the United States for the District and Territory of Hawaii and brought to this Court on Appeal, Nakashima, who had a domicil in San Jose, Cal., visited Japan, and on his return was ordered deported on the ground that he was in a class of excluded persons, by reason of the fact that he was suffering with trachoma; he claimed the right to land by reason of his having a domicil in the United States and he was enlarged on Habeas Corpus, the judgment of the District Court being affirmed on appeal.

Ex Parte Saraceno, 182 Fed. 955.
Davis vs. *Manolis,* 179 Fed. 818.
Botis vs. *Davies,* 173 Fed. 996.
Ex Parte, Koerner, 176 Fed. 478.
United States vs. *Sibray,* 178 Fed. 144.
In re Chop Tin, 2 U. S. D. C. Reports (Hawaii) 154.

Second:—Does the admitted fact that petitioner retained his domicil in the Territory of Hawaii at all times from the date of his arrival in 1906 *to the date of his second arrival, place him in the category of a non-immigrant alien, and as such, not amenable to the provisions of the immigration act of February* 20*th,* 1907, 34 *Stat.* 898, *as amended by Act of March* 26*th,* 1910, *and as such non-immigrant alien had he the right to land in the United States, even though he may come within the class of criminals as defined in Section* 2 *of this act?*

This question has been decided in several cases:

Rogers vs. *United States,* 152 Fed. 346.
In re Blchsbaum, 141 Fed. 221.
United States vs. *Aultman,* 143 Fed. 922.
In re Panzara, 51 Fed. 275.
In re Martorelli, 63 Fed 437.
In re Maiola, 67 Fed. 114.
United States vs. *Sandrey,* 48 Fed. 550.
In re Ota, 96 *Fed.* 487.
United States vs. *Burke,* 99 Fed. 895.
In re Di Simone, 108 Fed. 942.
Mofitt vs. *United States,* 128 Fed. 375.
United States vs. *Nakashima,* 160 Fed. 843.

We submit that the Nakashima case is conclusive and the United States Attorney has failed to show any valid reason why this Court should reverse or modify that case. It was contended below by the United States that the Nakashima case should be reversed since the law as it then existed, to-wit, the Act of March 3rd, 1903, 32. Stat. 1213, has been amended by the Act of February 20th, 1907, 34 Stat. 898, and again amended the Act of March 26th, 1910, 36 Stat. 263. While the tendency of recent legislation has been to make the laws relating to the immigration of undesirable aliens more strict, yet it is to be noticed that in none of the amendments have the rights of non-immigrant aliens been restricted or modified. The Congress of the United States when enacting the laws of 1907 and 1910 is presumed to be famliar with the cases above cited and the fact that Congress failed to change the law in this respect, as interpreted by the foregoing decisions clearly shows that there was no intention to affect the right of those aliens who had acquired a domicil in the United States.

In *United States* vs. *Aultman,* 143 Fed. 928, the Court say:

"Since that time the law has been amended, especially by the "Act of March 3rd, 1903; and it is a familiar principle that "when a certain construction has been given to a statute, es- "pecially when its general language has been qualified, and "subsequent legislation has not undertaken to change the "language so as to meet with the judicial definition, added per- "suasiveness is given to the construction of the law which the "Courts have put upon it. That is to say, that if Congress "intended to give a wider application to the law than the courts "have given to it, it is reasonable to assume that it would have "so legislated when it came to amend the law after the decisions "were made public."

It is clear that the Government of the United States considers the non-immigrant alien in a different class from that of alien immigrants for in its staticial rules of the Immigration Regulations it is provided that:

Rule VIII. Alien residents returning from a temporary

"trip abroad, and aliens residing abroad, coming to the United "States for a temporary trip, shall be classed as non-immigrant "aliens (except as provided by Rule IX.) Inspection officers "engaged in revising manifests are directed to see that all non-"immigrant aliens are distinctly indicated as such on manifests. "Non-immigrant aliens admitted should be reported on statis-"tical Forms 619, 620, and 651-656."

Luhrs vs. *Eimer,* 80 N. Y. 171.
Brannigan vs. *Union Co.,* 93 Fed. 164.
Gele vs. *Lemberger,* 163 Ill. 338.
Milliken vs. *Barrow,* 55 Fed. 148.

It is respectfully submitted that the judgment of the District Court should be affirmed.

TSUJI SUEKICHI,

By his Attorney,

J. LIGHTFOOT.

Dated, Honolulu, March 7th, 1912.